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REPORT
No. 92-415

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971

OCTOBER 28, 1971.—Ordered to be printed

Mr. WILLIAMS, from the Committee on Labor and Public Welfare, submitted the following

REPORT

together with

INDIVIDUAL AND SUPPLEMENTAL VIEWS

[To accompany S. 2515]

The Committee on Labor and Public Welfare, to which was referred the bill (S. 2515) to further promote equal employment opportunities for American workers, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill as amended do pass.

SUMMARY

The principal purpose of S. 2515 is to amend title VII of the Civil Rights Act of 1964 to provide the Equal Employment Opportunity Commission with a method for enforcing the rights of those workers who have been subjected to unlawful employment practices.

The enforcement procedures provided for in S. 2515 include the issuance of a complaint by the Commission after an investigation and efforts to conciliate, followed by a full administrative hearing on the record, the issuance of a cease and desist order by the Commission, and an opportunity for review by an appropriate court of appeals.

The bill confers upon the Commission the authority to proceed with pattern and practice cases of discrimination, and phases out the Attorney General's existing authority in such cases over a 2-year period. The Secretary of Labor's enforcement functions under Executive Order 11246 as amended relating to nondiscrimination in employment by Government contractors and Federally assisted construction contractors are transferred to the Commission.

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In addition, S. 2515 expands coverage of Title VII, from those employers and labor organizations having 25 or more employees or members to those having eight or more employees or members one year after the date of enactment. The bill also includes coverage of employees of State and local governments with a provision that complaints involving these employees will be litigated by the Attorney General in U.S. district courts, and eliminates the exemption for employees of educational institutions.

The Civil Service Commission is given expanded authority to eliminate discrimination in Federal employment, and individual Federal employees are expressly granted a right of private action to obtain relief from such discrimination.

The time limitations on filing charges are expanded from 90 to 180 days for a direct charge to the Commission and from 210 to 300 days for a charge which is first brought under a State or local law. Back pay awards are limited to two years prior to the date a charge is filed with the Commission. The bill also authorize the appointment of up to four additional members of the Commission.

As a result of six years experience with title VII, and in order to accommodate the enforcement power provided for in this bill, a number of administrative changes are contained in S. 2515. They include expanded record-keeping requirements and subpoena power, authority for the Commission to conduct its own litigation, and additional protections for aggrieved persons.

BACKGROUND

During the 90th Congress, a bill to provide the Equal Employment Opportunity Commission with power to issue cease and desist orders, S. 3465, was reported by the Committee on Labor and Public Welfare, but was not acted upon by the Senate. A closely comparable measure, S. 2453, was reported by the Committee during the 91st Congress, and was passed by the Senate on October 1, 1970, by a vote of 47 to 24. This measure was not brought to a vote in the House of Representatives, however.

On September 14, 1971, a bill with similar cease and desist provisions, S. 2515, was introduced by Senator Byrd of West Virginia, for Senator Williams and for 32 other Senators. Subsequently, on September 16, 1971, the House of Representatives passed H.R. 1746, a bill which would authorize the Equal Employment Opportunity Commission to go into United States district courts on charges of discrimination, rather than to issue its own cease and desist orders. An identical bill to H.R. 1746, S. 2617, was introduced by Senator Dominick on September 30, 1971.

The Subcommittee on Labor held hearings on these three bills on October 4, 6 and 7, 1971. S. 2515 was reported favorably by that Subcommittee on October 14, 1971, and was considered by the full Committee on Labor and Public Welfare on October 19, 20, and 21, 1971, when it was unanimously ordered reported to the Senate.

Testimony was received from a number of Federal Government officials on these bills. The Chairman of the United States Commission on Civil Rights, Reverend Theodore Hesburgh, testified in support of

all of the provisions of S. 2515, including cease and desist enforcement powers, consolidation of Federal equal employment opportunity functions, and expansion of coverage to state and local government employees. William Brown III, Chairman of the Equal Employment Opportunity Commission testified in support of S. 2515's cease and desist authority with the reservation that it should also contain court enforcement for pending cases. He endorsed expanded coverage, although he was not in favor of consolidation of EEOC functions. David Norman, Assistant Attorney General, Civil Rights Division, Department of Justice testified in support of a court enforcement approach, and against consolidation of functions. Laurence Silberman, Under Secretary of Labor testified against the transfer of the Executive Order program to the Commission, and Irving Kator, Assistant Executive Director of the Civil Service Commission presented testimony in opposition to the transfer of that Commission's equal employment opportunity functions to the Equal Employment Opportunity Commission.

Congressman Erlenborn of Illinois testified in behalf of a court enforcement approach and Congressman Walter Fauntroy testified on behalf of transferring the Civil Service equal employment opportunity functions to the Equal Employment Opportunity Commission.

Clarence Mitchell of the Leadership Conference on Civil Rights and the NAACP, Ken Meiklejohn on behalf of the AFL–CIO, Jack Greenberg of the NAACP Legal Defense and Education Fund., Inc., Joseph Rauh of the Leadership Conference on Civil Rights, Lucille Shriver of the National Federation of Business and Professional Women's Clubs, Olga Madar, Vice President, United Auto Workers, Esther Lawton and Daisy Fields of the Federally Employed Women and Doris Meissner of the National Women's Political Caucus testified in support of S. 2515, including its cease and desist enforcement functions, expanded coverage, and consolidation of functions.

Statements in support of S. 2515 were also received from: Donald E. Morrison, President, National Education Association; Reverend Dr. Ralph David Abernathy, President, Southern Christian Leadership Conference; Paul J. Minarchenko, Legislative Representative, American Federation of State, County and Municipal Employees—AFL–CIO; Hope Eastman, Acting Director, Washington Office, American Civil Liberties Union; William G. Lunsford, on behalf of Friends Committee on National Legislation; David A. Brody, Director, Washington Office, Anti-Defamation League of B'nai B'rith; National Council of Jewish Women; Ann Scott, Vice President—Legislation, The National Organization for Women; Mary Jean Collins-Robson, President, Chicago Chapter, NOW; The League of Women Voters; Mrs. Sherman Ross, Chairman, Legislative Program Committee, American Association of University Women; Germaine Krettek, Director, American Library Association; Edward Taylor Anderson, Legislative Associate, Common Cause; and Julius W. Hobson, Washington, D.C.

Testimony in support of a court enforcement bill, S. 2617 or H.R. 1746, was also received from Gerard Smetana on behalf of the American Retail Federation and William Dunn on behalf of the Associated General Contractors. In addition, statements in support of those bills

were submitted by the National Association of Manufacturers, Chamber of Commerce of the United States and the American Protestant Hospital Association.

NEED FOR THE BILL

Seven years ago, in response to compelling national need and concern, Congress enacted Title VII of the Civil Rights Act of 1964 (Public Law 88–352). By its action, Congress acknowledged the prevalence of employment discrimination in the United States and the need for Federal legislation to deal with the problem of such discrimination. The Act also established the Equal Employment Opportunity Commission (EEOC), whose operations were initiated on July 2, 1965. It was the intention of Congress that the EEOC should be the primary Federal agency responsible for eliminating discriminatory employment practices in the United States.

During the 6 years since its inception, the EEOC has made an heroic attempt to reduce the incidence of employment discrimination in the Nation, and to ameliorate the conditions which have led to the persistence of these practices. During this period, however, it has been demonstrated that employment discrimination is even more pervasive and tenacious than the Congress had assumed it to be at the time it passed the Act. It affects employees in both the private and the public sectors as well as those working in large and small establishments. It has also become clear that despite the national commitment of Congress to the goal of assuring equal employment opportunity for all our citizens, the machinery created by the Civil Rights Act of 1964 is not in all respects equal to that commitment.

The most striking deficiency of the 1964 Act is that the EEOC does not have the authority to issue judicially enforceable orders to back up its findings of discrimination. In prohibiting discrimination in employment based on race, religion, color, sex or national origin, the 1964 Act limited the Commission's enforcement authority to "informal methods of conference, conciliation and persuasion."

As a consequence, unless the Department of Justice concludes that a pattern or practice of resistance to Title VII is involved, the burden of obtaining enforceable relief rests upon each individual victim of discrimination, who must go into court as a private party, with the delay and expense that entails, in order to secure the rights promised him under the law. Thus, those persons whose economic disadvantage was a prime reason for enactment of equal employment opportunity provisions find that their only recourse in the face of unyielding discrimination is one that is time consuming, burdensome, and all too often, financially prohibitive.

This failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII. While the statutes dealing with discrimination in housing and in education provide appropriate enforcement powers for the agencies responsible for the elimination of discrimination in those areas of the law, Title VII, as it now stands, is little more than a declaration of national policy. Regretably, the practices and policies of discrimination in employment are so deeply ingrained that the voluntary conciliation approach has not succeeded in adequately combating the existence of such practices.

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially "human" problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.[1] In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. This kind of expertise normally is not found in either the personnel or legal arms of corporations, and the result in terms of conciliations is often an impasse, with the respondent unwilling or unable to understand the problem in the same way that the Commission perceives it.

The resulting impasse between EEOC and the employer has played a large part in the present failure of Title VII. The employer realizes that any attack on its policies by the EEOC presents largely an ineffectual threat. To comply with the Commission's interpretation of a problem, and to accord the appropriate relief, is a purely voluntary matter with the respondent with no direct legal sanctions available to EEOC. This absolute discretion available to respondents has not proven conducive to the success of Title VII objectives. In cases posing the most profound consequences, respondents have frequently ignored the EEOC's findings, preferring rather to chance the unlikelihood that the complainant will pursue his claim further through the costly and time-consuming process of court enforcement. The social consequences have been extreme.

The failure of the voluntary conciliation approach is reflected in the present EEOC workload statistics presented by its Chairman, William H. Brown, III. Since its inception, the Commission has received 81,000 charges. Of this number, the Commission has been able to achieve a totally, or even partially satisfactory conciliation in less than half. This means that in a significant number of cases the aggrieved individual was not able to achieve any satisfactory settlement of his claim through the EEOC, and was forced to either give up his or her claim or, if the necessary funds and time were available, to pursue the case through the Federal courts.

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[1] See e.g. "Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964" 84 Harv. L. Rev. 1109 (1971); Cooper and Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring and Promotion," 82 Harv. L. Rev. 1623 (1969); Blumrosen, "The Duty of Fair Recruitment Under the Civil Rights Act of 1964," 22 Rutgers L. Rev. 465 (1968). See also M. Sovern, Legal Restraints on Racial Discrimination in Employment (1966), and decisions in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Asbestos Workers, Local 53* v. *Vogler*, 407 F. 2d 1047 (C.A. 5 1969); *Quarles* v. *Phillip Morris*, 279 F. Supp. 505 (E.D. Va., 1968); *United States* v. *Local 189, United Papermakers*, 282 F. Supp. 39 (E.D. La., 1968) and cases cited therein.

While the above-noted number of charges is disturbing by its very size, it becomes even more significant when considered in light of the fact that each year the number of charges filed with the Commission continues to increase. For example, in FY 1970, 14,129 charges were filed with EEOC; in FY 1971, this number increased to 22,920 charges; and current estimates submitted by the Commission indicate that more than 32,000 charges will be filed this year. It is obvious that without effective enforcement powers, the EEOC will become little more than a receptacle for charges of violations of Title VII, and that an ever-increasing number of aggrieved individuals will be left without an adequate remedy for violations which are clearly prohibited by the law.

The impact of this inability to obtain relief from employment discrimination surfaces in another, more indicative set of facts—the economic disparities which presently affect this Nation's minorities and women.

In a special report released this year by the Bureau of the Census, "The Social and Economic Status of Negroes in the United States," the evidence is clear that while some progress has been made toward bettering the economic position of the Nation's black population, the avowed goal of social and economic equality is not yet anywhere near a reality. For example, the report shows that the median family income for Negroes in 1970 was $6,279, while the median income for whites during the same period was $10,236. This earnings gap shows that Negroes are still far from reaching their rightful place in society.

Support for the above statement is provided by statistics in the Census Bureau report which show that Negroes are concentrated in the lower-paying, less prestigious positions in industry and are largely precluded from advancement to the higher paid, more prestigious positions. For example, while Negroes constitute about 10% of the labor force, they account for only 3% of all jobs in the high-paying professional, technical, and managerial positions. In the nine industries with the highest earning capabilities (printing and publishing, chemicals, primary metals, fabricated metals, nonelectrical machinery, transportation equipment, air transportation, and instruments manufacture), Negroes hold only 1% of professional and managerial positions. On the other hand, in the lowest paying laborer and service worker categories, Negroes account for 24% of all jobs.

This economic disparity is further reinforced by statistics which show that the unemployment rate for Negroes is considerably higher than that for whites. Figures available for 1970 show that while 4.0% of white males were unemployed, and the unemployment rate for all whites was 5.4%, 9.3% of all Negroes were unemployed. Even in the managerial and professional positions, the area with the lowest unemployment rate, Negro unemployment was 2.1% while white unemployment was 1.7%.

While statistics on Spanish-speaking Americans are not nearly as current or as complete, available data indicates that this, the second-largest ethnic minority group in the Nation, with approimately 7.5 million members, is in a similar situation. In 1969, the median family income for Spanish-speaking American families was $5,641. About 17% of these families had incomes of less than $3,000. Both male and

female Spanish-speaking workers, as has already been shown to be the case with Negroes, are also concentrated in the lower-paying occupations. Only 25% of employed Spanish-speaking males are in white-collar jobs, compared to 41% of men for all other origins. On the other hand, 58.8% of Spanish-speaking males are concentrated in blue-collar occupations. The statistics for Spanish-speaking women workers indicates a similar disparate distribution. Also, as with Negroes, Spanish-speaking workers suffer a higher unemployment rate when compared to the white population. In 1969, 6.0% of Spanish-speaking Americans were unemployed, compared to 3.5% for the rest of the Nation.

The situation for working women is no less serious. The disparate treatment of women in this country has been shown in a series of studies undertaken by the Women's Bureau of the U.S. Department of Labor. [2] These studies show that there are aproximately 30 million employed women in the Nation, constituting about 38% of the total work force. The number of working women has also increased very rapidly during the last two decades—between 1947 and 1968 the number of women in the civilian labor force increased by 75% while the number of men during the same period increased only 16%. Despite this large increase in the numbers of women in the work force, women continue to be relegated to low paying positions and are precluded from high-paying executive positions. Similarly, the rate of advancement for women is slower than for men in similar positions.

Information supplied by the U.S. Department of Labor's Women's Bureau shows that 70% of all employed women work in order to provide primary support for themselves or to provide a supplement to the incomes of their husbands which may be needed to meet household expenses. However, within established occupational categories, women are paid less for doing the same jobs as are done by men. For example, in 1968, the latest year for which extensive data is presently available, the median salary for all scientists was $13,200; for women scientists the median saary was $10,000. Similarly, the median salary for a full-time male factory worker was $6,738 while his female counterpart could only expect to earn $3,991. This economic disparity is further emphasized by figures which show that 60% of women but only 20% of men earned less than $5,000 per year, while only 3% of women but 28% of men earned $10,000 per year or more.

While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics.[3] Both categories involve large, natural classes, membership in which is beyond the individual's control; both

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[2] U.S. Department of Labor, *Fact Sheet on the Earnings Gap* (1971); U.S. Department of Labor, *Underutilization of Women Workers* (1970); U.S. Department of Labor, Bulletin 294, *1969 Handbook on Women Workers* (1969); U.S. Department of Labor, *Changing Patterns of Women's Lives* (1970).

[3] See A. Montagu, *Man's Most Dangerous Myth* 181–4 (4th ed. 1964): G. Myrdal, *An American Dilemma* 1073–78 (2d ed. 1962). See also "Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?", 84 Harv. L. Rev. 1499 (1971); Murphy & Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 Geo. Wash. L. Rev. 232 (1965).

involve highly visible characteristics on which it has been easy to draw gross, stereotypical distinctions. The arguments justifying different treatment of the sexes were also historically used to justify different treatment of the races.

While it is true that the extreme aspects of sex-discrimination as it existed in the early part of the twentieth century have been dispelled, and women have now been granted the right to vote and may serve on juries, their status in employment is still subject to blatant discrimination. In a series of decisions in recent years, the courts have voided employment practices and policies which discriminate on the basis of sex, and have, accordingly, set the necessary legal precedents for dealing with this form of discrimination.[4] However, despite the effort by the courts and EEOC, discrimination against women continues to be widespread; and is regarded by many as either morally or physiologically justifiable.

The Committee realizes that enactment of this bill will not automatically end employment discrimination in this country. The bill offers no panaceas or guarantees of success. Despite several aspects of the operation of Title VII during these last 6 years which reflect major advancements in securing equal employment opportunity for all Americans, the results are, nonetheless, disappointing in terms of what minorities and women have a right to expect under the provisions of that law. Particularly disillusioning has been the Congressional establishment of the EEOC without adequate enforcement; it has, in most respects, proved to be a cruel joke to those complainants who have in good faith turned to the Federal government with the complaint of discrimination only to find, after a lengthy investigatory and conciliatory process, that the Government cannot compel compliance.

The accomplishment of Congress in enacting the Civil Rights Act of 1964 is further dimmed by the fact that this is the fourth effort since that time to enact suitable enforcement legislation. The time has come for Congress to correct the defects in its own legislation. The promises of equal job opportunity made in 1964 must be made realities in 1971.

Major Provisions of the Bill

CHANGES IN COVERAGE UNDER TITLE VII

The bill expands the coverage of Title VII in the following respects:

1. *Eight or more employees.*—Section 701 of the Act (section 2 of the bill) is amended to expand the coverage of title VII to include employers of eight or more persons, and labor organizations with eight or more members. The Committee agrees with the Chairman of EEOC that discrimination should be attacked wherever it exists, and recognizes that small establishments have frequently been the most flagrant violators of equal employment opportunity.

At present, the jurisdiction of the EEOC extends to approximately 83% of the nation's non-agricultural work force (approximately 250,000 employers and 37,800 labor organizations). By adding the provi-

[4] See e.g. *Phillips* v. *Martin-Marietta Corp.* 400 U.S. 542 (1971); *Diaz* v. *Pan American World Airways*, 442 F. 2d 385 (C.A. 5, 1971); *Weeks* v. *Southern Bell Telephone Co.*, 408 F. 2d 228 (C.A. 5, 1969); *Bowe* v. *Colgate Palmolive Co.*, 416 F. 2d 711 (C.A. 7, 1969)

sions as currently proposed, the jurisdiction of the EEOC would encompass another 8% of the present work force, or approximately 6.5 million employees and about 90,000 employers.

The need for coverage in this area is obvious. The absence of EEOC jurisdiction over these small employers and labor organizations has made it impossible for the Commission to compile sufficient information in this area to pinpoint those areas where patterns or practices of discrimination exist. As a consequence, it has not been possible to institute changes where necessary to insure compliance with the provisions of Title VII.

The Committee is not persuaded by arguments that the increased coverage will inundate EEOC with complaints and paperwork. In the first instance, the proposition that the increased coverage will overwhelm the Commission with an unmanageable number of new cases is not convincing. This argument, which has traditionally been presented whenever a new jurisdictional area is opened up, has proven to be largely false in other areas of expanded Federal jurisdiction. Also, it must be noted that although the proposed increase will result in coverage of more employers, these employers represent proportionately fewer employees, therefore mitigating against any massive influx of cases. The argument that the Commission will be overburdened by additional paperwork is similarly alarmist. All EEOC reporting procedures are now fully computerized, and once the initial reprogramming is accomplished to account for the new coverage, the Committee believes that any additional burden will not be noticeable.

However, since the Commission will be undertaking several new areas of responsibility under the proposed legislation, the Committee recognizes that the Commission may have some difficulty in handling the increased caseload immediately. Therefore, the bill provides that the expansion take place one year after enactment of the bill.

2. *State and local governments.*—The bill would amend section 701 of the Act (section 2 of the bill) to broaden the jurisdictional coverage of title VII by deleting the existing exemptions for State and local government employees. The Attorney General is given the authority to bring civil actions involving unlawful employment practices committed by State and local governmental agencies.

The Committee believes that employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy.

There are at present approximately 10.1 million persons employed by State and local governmental units. This figure represents an increase of over 2 million since 1964, and all indications are that the number of State and local employees will continue to increase more rapidly during the next few years. Few of these employees, however, are afforded the protection of an effective Federal forum for assuring equal employment opportunity. By amending the present section 701 to include State and local governmental units within the definition of an "employer" under Title VII, all State and local governmental employees would, under the provisions of the bill, have access to the remedies available under the Act.

In a report released in 1969 by the U.S. Commission on Civil Rights, "For All the People * * * By All the People," that Commission concluded that:

> * * * State and local governments have failed to fulfill their obligation to assure equal job opportunity * * * Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job.

The report's findings indicate that the existence of discrimination is perpetuated by both institutional and overt discriminatory practices, and that past discriminatory practices are maintained through *de facto* segregated job ladders, invalid selection techniques, and stereotypical misconceptions by supervisors regarding minority group capabilities. The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector.

In another report issued by the U.S. Commission on Civil Rights in 1970, "Mexican Americans and the Administration of Justice in the Southwest," the Commission found that in the five Southwestern states with the highest concentration of Spanish-speaking Americans, their representation in the vital area of law enforcement was significantly disproportionate to their demographic distribution. The report shows that in these five Southwestern states, Spanish-speaking Americans, who constitute approximately 12% of the population account for only 5.2% of police officers and 6.11% of civilian employees associated with law enforcement agencies.

This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

The Constitution is imperative in its prohibition of discrimination by State and local governments. The Fourteenth Amendment guarantees equal treatment of all citizens by States and their political subdivisions, and the Supreme Court has reinforced this directive by holding that State action which denies equal protection of the laws to any person, even if only indirectly, is in violation of the Fourteenth Amendment.[5] It is clear that the guarantee of equal protection must also extend to such direct action as discriminatory employment practices.

The Committee believes that it is an injustice to provide employees in the private sector with the assistance of an agency of the Federal

[5] See, e.g., *Shelly* v. *Kraemer*, 334 U.S. 1 (1948); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

Government in redressing their grievances while at the same time denying assistance similar to State and local government employees. The last sentence of the Fourteenth Amendment, enabling Congress to enforce the Amendment's guarantees by appropriate legislation is frequently overlooked, and the plain meaning of the Constitution allowed to lapse. The inclusion of State and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the "appropriate legislation" to insure that all citizens are treated equally in this country.

The Supreme Court has further indicated that at least part of the extension of jurisdiction as contemplated by S. 2515 is a proper constitutional exercise of power under the Commerce Clause. In its decision in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court upheld the extension of the Fair Labor Standards Act to certain classes of public employees as a legitimate exercise of congressional regulatory authority under the Commerce Clause. The Court rejected the argument that Federal regulation of the employment practices of State and local governments is an improper infringement upon the sovereignty of the States. Pointing out that the activities of State and local governments can affect commerce, it held:

> If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to Federal regulation.[6]

A question was raised in the Committee concerning the application of Title VII in the case of a Governor whose cabinet appointees and close personal aides are drawn from one political party. The Committee's intention is that nothing in this bill should be interpreted to prohibit such appointments unless they are based on discrimination because of race, color, religion, sex or national origin. That intention is reflected in sections 703(h) and 706(w) of the law.

3. *Employees of educational institutions.*—The existing exemption for employees of educational institutions is eliminated by an amendment to section 702 (sec. 3 of the bill).

There are at present over 120,000 educational institutions, with approximately 2.8 million teachers and professional staff members and another 1.5 million non-professional staff members. Yet all of these employees are, in effect, without an effective Federal remedy in the area of employment discrimination.

The presence of discrimination in the Nation's educational institutions is no secret. Many of the most famous and best remembered civil rights cases have involved discrimination in education. This discrimination, however, is not limited to the students alone. Discriminatory practices against faculty, staff, and other employees is also common. The practices complained of parallel the same kinds of illegal actions which are encountered in other sectors of business, and include illegal

[6] In rejecting the State sovereignty argument the Court cited a long series of decisions holding that a State, when engaged in activities affecting interstate commerce, may be held subject to Federal regulations. See *United States* v. *California*, 297 U.S. 175 (1936); *Board of Trustees* v. *United States*, 289 U.S. 48 (1932). See also, *Parden* v. *Terminal Railroad Co.*, 371 U.S. 184 (1962).

hiring policies, testing provisions which tend to perpetuate racial imbalances, and discriminatory promotion and certification techniques.[7]

As in other areas of employment, statistics for educational institutions indicate that minorities and women are precluded from the more prestigious and higher-paying positions, and are relegated to the more menial and lower-paying jobs. While in elementary and secondary school systems Negroes accounted for approximately 10% of the total number of positions, in the higher-paying and more prestigious positions in institutions of higher learning, blacks constituted only 2.2% of all positions, most of these being found in all-black or predominantly black institutions. Women are similarly subject to discriminatory patterns. Not only are they generally under-represented in institutions of higher learning, but those few that do obtain positions are generally paid less and advanced more slowly than their male counterparts. Similarly, while women constitute 67% of elementary and secondary school teachers, out of 778,000 elementary and secondary school principals, 78% of elementary school principals are men and 94% of secondary school principals are men.

The Committee believes that it is essential that these employees be given the same opportunity to redress their grievances as are available to other employees in the other sectors of business. Accordingly, the Committee has concluded that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the Act. There is nothing in the legislative background of Title VII, nor does any national policy suggest itself, to support the present exemption. In fact, the Committee believes that the existence of discrimination in educational institutions is particularly critical. It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

4. *Federal employment.*—The bill adds to title VII a new section 717 (section 11 of the bill) making clear the obligation of the Federal Government to make all personnel actions free from discrimination based on race, color, sex, religion or national orgin. The Civil Service Commission, which presently has the responsibility under Executive Order 11478, is given the authority under this title to enforce equal employment opportunity in the Federal government.

The Federal government, with 2.6 million employees, is the single largest employer in the Nation. It also comprises the central policy-making and administrative network for the Nation. Consequently, its policies, actions, and programs strongly influence the activities of all other enterprises, organizations and groups. In no area is government action more important than in the area of civil rights.

The prohibition against discrimination by the Federal government, based upon the due process clause of the Fifth Amendment, was judi-

[7] See e.g. *Armstead* v. *Starkville School District*, 325 F. Supp. 560 (N.D. Miss. 1971); *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (C.A. 5, 1969); *Jackson* v. *Wheatley School District*, 430 F. 2d 1359 (C.A. 8, 1970); *Wall* v. *Stanley County Board of Education*, 378 F. 2d 275 (C.A. 4, 1967). See also "A Muncipal Corporation May be Sued Under the Civil Rights Act for Equitable Relief," 70 Colum. L. Rev. 1467 (1970).

cially recognized long before the enactment of the Civil Rights Act of 1964.[8] Congress itself has specifically provided for nondiscrimination in the Federal government by stating that it is "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin . . ." (5 U.S.C. § 7151). The primary responsibility for implementing this stated National objective has been granted to the Civil Service Commision pursuant to Executive Order 11246 (1964), and more recently by Executive Order 11478 (1969). In his memorandum accompanying Executive Order 11478, President Nixon stated that "discrimination of any kind based on factors not relevant to job performance must be eradicated completely from Federal employment." This was an important step forward in the field of equal employment opportunity for Federal employees.

Progress has been made in this field, however, much remains to be done. Statistical evidence shows that minorities and women continue to be denied access to a large number of government jobs, particularly in the higher grade levels. The disparity can be clearly seen in figures presented in a recent report released by the Civil Service Commission, *Minority Group Employment in the Federal Government* (1970). On the basis of the figures presented therein, the following listing shows the percentage of minority group employees under the General Schedule by grade level:

	Negro	Spanish-surnamed	American Indian	Oriental
GS–1 through GS–4	21.8	3.0	1.8	.6
GS–5 through GS–8	13.5	2.2	.7	.8
GS–9 through GS–11	5.1	1.5	.5	1.0
GS–12 through GS–13	2.7	.8	.2	.9
GS–14 through GS–15	1.7	.7	.2	.8
GS–16 through GS–18	1.4	.3	.1	.2

Minorities represent 19.4% of the total employment in the Federal government (15.0% are Negroes, 2.9% are Spanish-surnamed, 0.7% are American Indians, and 0.8% are Oriental). Their concentration in the lower grade levels indicates that their ability to advance to the higher levels has been restricted.

In many areas, the pattern at regional levels is worse than the national pattern. For example, the committee notes with special concern the particularly low percentage of Federal jobs held by Spanish-surnamed persons in areas of high residential concentration of such persons, particularly in California and the Southwestern States, and expects the Commission to undertake a special study of this problem to develop programs to provide greater entry level and advancement employment opportunities for Spanish-surnamed persons.

The position of women in the Federal government has not fared any better. In testimony before the Senate Labor Subcommittee this year, Mrs. Daisy B. Fields, past president of Federally Employed Women (FEW), testified as to the distribution, by percent, of all women employed by the Federal government (approximately 665,000 or about 34%) as represented by the following breakdown:

	Percent
GS–1 through GS–6	76.7
GS–7 through GS–12	21.7
GS–13 and above	1.1

[8] See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) and cases cited therein.

The inordinate concentration of women in the lower grade levels, and their conspicuous absence from the higher grades is again evident.

One feature of the present equal employment opportunity program which deserves special scrutiny by the Civil Service Commission is the complaint process. The procedure under the present system, intended to provide for the informal disposition of complaints, may have denied employees adequate opportunity for impartial investigation and resolution of complaints.

Under present procedures, in most cases, each agency is still responsible for investigating and judging itself. Although provision is made for the appointment of an outside examiner, the examiner does not have the authority to conduct an independent investigation, and his conclusions and findings are in the nature of recommendations to the agency head who makes the final agency determination on whether there is, in fact, discrimination in that particular case. The only appeal is to the Board of Appeals and Review in the Civil Service Commission.

The testimony before the Labor Subcommittee reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees. Complaints have indicated skepticism regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement. The new authority given to the Civil Service Commission in the bill is intended to enable the Commission to reconsider its entire complaint structure and the relationships between the employee, agency and Commission in these cases.

Another task for the Civil Service Commission is to develop more expertise in recognizing and isolating the various forms of discrimination which exist in the system it administers. The Commission should be especially careful to ensure that its directives issued to Federal agencies address themselves to the various forms of systemic discrimination in the system. The Commission should not assume that employment discrimination in the Federal Government is solely a matter of malicious intent on the part of individuals. It apparently has not fully recognized that the general rules and procedures that it has promulgated may in themselves constitute systemic barriers to minorities and women. Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on "paper" credentials. Similar requirements in the private sectors of business have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (see e.g. *Griggs* v. *Duke Power Co.*, supra n.1). The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a very heavy burden in trying to meet such artificial qualifications.

It is in these and other areas where discrimination is institutional, rather than merely a matter of bad faith, that corrective measures appear to be urgently required. For example, the Committee expects the Civil Service Commission to undertake a thorough re-examination

of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met.

The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which may result in a lack of true equal employment opportunity. Yet, the Committee was persuaded that the Civil Service Commission is sincere in its dedication to the principles of equal employment opportunity enunciated in Executive Order 11478 and that the Commission has the will and desire to overcome any such conflict of interest. In order to assist the Commission in accomplishing its goals and to make clear the Congressional expectation that the Commission will take those further steps which are necessary in order to satisfy the goals of Executive Order 11478, the Committee adopted in Section 707(b) of the bill specific requirements under which the Commission is to function in developing a comprehensive equal employment opportunity program.

Thus the provision in section 717(b) for applying "appropriate remedies" is intended to strengthen the enforcement powers of the Civil Service Commission by providing statutory authority and support for ordering whatever remedies or actions by Federal agencies are needed to ensure equal employment opportunity in Federal employment. Remedies may be applied as a result of individual allegations of discrimination, CSC investigation of equal employment opportunity programs in Federal agencies or their field installations, or from review of agency plans of action and progress reports. Remedies may be in terms of action required to correct a situation regarding a single employee or group of employees or broader management action to correct systemic discrimination and to improve equal employment opportunity program effectiveness to bring about needed progress. The Commission is to provide Federal agencies with necessary guidance and authority to effectuate necessary remedies in individual cases, including the award of back pay, reinstatement or hiring, and immediate promotion where appropriate.

The bill also directs the Commission to require each Federal department and agency (including appropriate units of the District of Columbia Government) to prepare an equal employment opportunity affirmative plan of action at least annually. The Commission is to review, modify, and approve each department or agency developed with full consideration of particular problems and employment opportunity needs of individual minority group populations within each geographic area. These legislative directions are, of course, not intended to limit the Commission in requiring the establishment of affirmative equal employment opportunity plans for any agency level, including local installations as needed; indeed, the Committee expects the Commission to require that agency plans include specific regional plans for particularly large Federal regional installations and other regional offices with deficient records of progress in equal employment opportunity. The Committee recognizes that this new emphasis on regional installation equal employment opportunities and action plans will require a greater commitment of both agency and Civil Service Commission personnel to planning and enforcement activities and expects the Civil Service Commission to ensure that

such staffing additions will be made both at the national and regional office levels. Finally, to lend the greatest credibility to its equal employment opportunity efforts at a national and regional level, the Commission should review and revise its own equal employment action plan and implementation, particularly at its regional offices and higher grade levels, to ensure that its own record in this field is exemplary and thus a model for all other Federal agencies.

The bill requires the Commission to obtain, on at least a semi-annual basis, minority group employment and such other data as are necessary for effective evaluation by the Commission and the public of each department's, agency's or unit's record of equal employment opportunity achievement and to publish at least semi-annually full statistical and other reports (comparable to the report now published annually) of equal employment opportunity progress. In evaluating agency plans for approval, the Commission is also directed to study and determine the appropriate allocation of personnel and resources committed to, and the qualifications to be established for top equal employment opportunity officials responsible for, carrying out program responsibilities, including necessary affirmative action as well as processing of individual discrimination cases, on both a central office and regional (SMSA) basis.

The Committee wishes to emphasize the significant reservoir of expertise developed by the EEOC with respect to dealing with problems of discrimination. According, the committee strongly urges the Civil Service Commission to take advantage of this knowledge and experience and to work closely with EEOC in the development and maintenance of its equal employment opportunity programs.

An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision.

The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII.

The bill (section 717(c)) enables the aggrieved Federal employee (or applicant for employment) to file an action in the appropriate U.S. district court after either a final order by his agency or a final order of the Civil Service Commission on an appeal from an agency decision or order in any personnel action in which the issue of discrimination on the basis of race, color, religion, sex or national origin has been raised by the aggrieved person. It is intended that the employee have the option to go to the appropriate district court or the District Court for the District of Columbia after either the final decision within his agency on his appeal from

the personnel action complained of or after an appropirate appeal to the Civil Service Commission or after the elapse of 180 days from the filing of the initial complaint or appeal with the Civil Service Commission.

CHANGES IN ENFORCEMENT PROVISIONS

Section 4 of the bill revises section 706 of the act to enable the EEOC to process a charge of employment discrimination through the investigation, conciliation, administrative hearing, and judicial review stages.

The present act, which only allows the Commission to pursue charges through the informal methods of persuasion and conciliation, has, as already shown, proven to be seriously defective in providing an effective Federal remedy for violations of title VII. Since the compliance provisions of the present law, as regards the findings of the EEOC, are purely voluntary, and respondents have not generally been very agreeable to accepting EEOC decisions where discriminatory practices are found, the burden of relief has been placed upon the aggrieved individual's private right of action in the Federal courts.

This method has generally worked to the disadvantage of the aggrieved individuals. Since most title VII complainants are by the very nature of their complaint disadvantaged, the burden of going to court, initiating legal proceedings by retention of private counsel, and the attendant time delays and legal costs involved, have effectively precluded a very large percentage of valid title VII claims from ever being decided. This disparity between complainants and respondents in title VII litigation has been recognized by the courts which have characterized such litigation as a "modern day David and Goliath confrontation." [9] In such situations, the public has an overriding interest in protecting the individual from the denial of those rights which Congress has specifically provided.

To accomplish the stated purpose of title VII, the bill, while retaining the private right of action, provides, as well, for the elimination of unfair employment practices through a system of administrative hearings, Commission decisions and orders, and ultimate court review in appropriate cases—the method of enforcement which has long been utilized by other regulatory agencies.

The need to provide some form of direct enforcement power to the EEOC has been voiced since the inception of the Commission. There is disagreement whether this enforcement power should be through a Commission lawsuit in a U.S. district court, or by an administrative proceeding followed by a cease-and-desist order with review in the appropriate U.S. court of appeals.

The committee is unanimous in its view that some method of enforcement is required for title VII. An alternative measure providing for court enforcement for title VII, instead of the administrative cease-and-desist procedure, was given full and careful consideration in the hearings and in the full committee. That measure, however, was rejected, and the bill with administrative cease-and-desist procedures was adopted. Without exception, all spokesmen for the major civil

[9] See *Sanchez v. Standard Brands, Inc.*, 431 F. 2d 455 (C.A. 5, 1970); *Jenkins v. United Gas Corp.*, 400 F. 2d 28 (C.A. 5, 1968); *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998 (C.A. 5, 1969).

rights groups strongly supported the cease-and-desist enforcement powers.

Father Theodore Hesburgh, Chairman of the U.S. Commission on Civil Rights, testified that cease-and-desist authority is the most effective and expeditious enforcement mechanism available for use against employment discrimination and that experience has demonstrated that the existence of cease-and-desist authority encourages settlement of complaints before the enforcement state is reached.

The Committee was not persuaded that the direct court enforcement technique would be faster and more effective than traditional administrative enforcement. The present—and ever increasing overcrowded—caseloads of the Federal courts is a well-known fact, and, as repeatedly emphasized by the Judicial Conference of the United States, measures are desparately needed to expedite trials and relieve the dockets of these courts.

Statistics appearing in the 1970 Annual Report of the Director of the Administrative Office of the U.S. Courts indicate that there were 16,032 trials completed in the U.S. district courts in 1970, up 11 percent over 1969 and about 60 percent more than in 1962. There was a total of 127,240 civil and criminal cases on the dockets in 1970, and in jurisdictions where the caseloads are the heaviest, it is not uncommon for several years to elapse before a matter is reached for trial.

The Judicial Conference Report mentions specifically that civil rights cases have accounted for a good part of the overall growth in case filings. Between 1961 and 1970 there was an increase of more than 1,200 percent in civil rights cases filed and in the year 1970 itself, there were 3,985 civil rights cases filed compared to 2,453 in 1969, an increase of 63 percent.

The potential for court backlog created by requiring these cases to be handled at the initial level in the district courts is clear from these statistics. Moreover, Chief Justice Burger called attention to the problem of overburdening the courts with new cases in his address to the American Bar Association in July of 1970 when he stated:

> From time to time Congress adds more judges, but the total judicial organization never quite keeps up with the caseload Two recent statutes alone added thousands of cases relating to commitment of narcotic addicts and the mentally ill. These additions came when civil rights cases, the voting cases and prisoner petitions were expanding by the thousands.

In appraising the question of enforcement by district court trials rather than through agency hearings followed by appellate court review, the committee was thus particularly concerned with the acute problem of overcrowding of our trial court system. It recognized that to thrust this additional caseload on the district courts would not only clog the already overburdened trial dockets of the courts, but might well delay the administration of justice on a national scale unprecedented in our history. It is truly said that "Justice delayed is justice denied." Such is not our objective.

Another aspect that is involved in the enforcement of Title VII concerns the importance of administrative expertise relating to the resolution of problems of employment discrimination. Many of the Title VII proceedings involve complex labor relations and business

operations issues particularly in the fashioning of the remedies for eliminating discrimination. The Equal Employment Opportunity Commission would be expected to develop an important reservoir of expertise in these matters, expertise which would not readily be available to a widespread court system. It is expected that through the administrative process the Commission will continue to define and develop the approaches to handling serious problems of discrimination that are involved in the area of employment including testing and labor relations (including seniority systems). It is incumbent upon this administrative agency to develop the necessary expertise, ingenuity, and sensitivity that will effectuate the purposes of Title VII, provide full relief to aggrieved persons, and still maintain an appropriate understanding of the problems faced by the employment sector.

It should also be noted that the administrative cease-and-desist approach encourages early settlement of claims, thereby further alleviating the courts and providing quick relief for aggrieved individuals. For example, in the Summary of Operations by the General Counsel of the National Labor Relations Board (NLRB) for fiscal year 1970 and the first 6 months of 1971, figures show that in fiscal year 1970 the NLRB received a record 33,581 cases. Of these, however, 92.4 percent were dissposed of without the need for a formal hearing. Of the 2,217 cases which were heard by hearing examiners, only 420 had to be filed for review or enforcement in the courts of appeals, and only about half of these were ever set for oral argument. Experience with other Federal agencies and State fair employment agencies indicates a similar trend toward relatively few incidents of actual adjudication.

Further considerations weighing in favor of administrative cease-and-desist powers are:

(1) This is the type of authority given to many other Federal regulatory agencies.[10-11]

(2) It is the type of enforcement authority preferred by 32 of 37 States which have equal employment opportunity laws. [12]

(3) It will insure more quickly a unified approach to the problems of discrimination since decisions would be rendered by one agency rather than several hundred district court judges.

(4) It will provide the needed expertise in recognizing and solving the more subtle, institutional forms of discrimination.

Following is a comparison of the procedures which are followed when a charge is filed with the Commisson under title VII in its present form and those that would be followed under the bill:

Under existing law.—After a charge is filed alleging that an unlawful employment practice has been committed, the Commission investigates and determines whether there is reason to believe that the al-

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[10-11] In addition to the NLRB, other agencies having such powers include: Atomic Energy Commission, National Transportation Board, Federal Communications Commission, Federal Power Commission, Securities and Exchange Commission, Subversive Activities Control Board, Department of Agriculture, Department of Health, Education, and Welfare, Department of Justice, Department of Transportation, Department of Defense, Department of Interior, Interstate Commerce Commission, Treasury Department, and Department of Labor.

[12] States will cease and desist authority: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, Wisconsin, and Wyoming It is interesting to note that two of the above, Delaware and New Mexico recently amended their existing enforcement laws to include cease-and-desist powers.

legations in the charge are true. If the Commisison finds no reasonable cause, it dismisses the charge, thus terminating the proceeding before the Commission. If the Commission decides that there is reasonable cause to believe that the allegation of the charge is true, it attempts to eliminate the unlawful practice by means of informal methods of conference, conciliation, and persuasion. If the Commission is unable to achieve voluntary compliance, it notifies the person claiming to be aggrieved, who then has a right to bring a private civil action against the respondent in the district court. The Commission now has no further authority to act to resolve the dispute.

Under the bill—1. Upon the filing of a charge, the Commission would investigate. If, after investigation, the Commission decides that there is no reasonable cause to believe that the charge is true, it would dismiss the charge and notify the person claiming to be aggrieved and the respondent (sec. 706(b)).

2. If the Commission finds reasonable cause, it would seek to eliminate the unlawful practice by informal methods of conference, conciliation, and persuasion (sec. 706(b)). An agreement for the elimination of the alleged unlawful practice can be entered into by the Commission (Sec. 706 (f) and (i)), any time between the filing of the charge and until the record is filed in the Court of Appeals (sec. 706(i)). (See below regarding private right of action if the aggrieved person does not enter into the conciliation agreement.)

3. If the Commission determines that it is unable to secure an acceptable agreement, it would issue and serve upon the respondent a complaint and notice of hearing (sec. 706(f)). The administrative hearing, the purpose of which is to take evidence as to whether an unlawful practice has been committed and to adjucate the claims of the parties named in the charge, or permitted to be joined, or allowed to intervene, would be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, before the Commission, one of its members, or a hearing examiner appointed in accordance with Federal law (sec. 706 (g) and (j)). The rules of evidence applicable to the district courts would be followed so far as practicable.[13]

4. After completion of the administrative hearing, the Commission would issue a decision disposing of the case on the merits. The Commission could find that the respondent has engaged in an unlawful employment practice, in which case it would issue an order requiring the respondent to cease and desist from its unlawful conduct and to take such affirmative action as would effectuate the policies of the title (sec. 706(h)). In issuing its order, the Commission, in any situation involving back pay, would be limited to an award of two years prior to the date of the filing of the charge with the Commission.

The Commission's order may be enforced through entry of an appropriate decree of a United States court of appeals.

5. If, on the basis of a preliminary investigation, the Commission determines that prompt judicial action is necessary to preserve its power to grant effective relief, it would be required, following the

[13] See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *On Lee* v. *United States*, 343 U.S. 747 (1952); *United States* v. *Costello*, 221 F. 2d 668 (C.A. 2, 1955), aff'd on other grounds 350 U.S. 359 (1956); *American Rubber Products Corp.* v. *NLRB*, 214 F. 2d 47 (C.A. 7, 1954).

issuance of a complaint, to seek preliminary or temporary relief in Federal district court, pending the final disposition of the charge or appeal to the court of appeals (sec. 706(p)).

The intent of section 706(p) is to incorporate existing law developed in private actions and "pattern or practice" suits under title VII of the Civil Rights Act of 1964.[14-15] Courts have generally regarded petitions for preliminary relief in such cases favorably, and have granted preliminary injunctions against the continuation of unlawful employment practices in situations which would normally call for such relief in proceedings under rule 65 of the Federal Rules of Civil Procedure.

The committee believes that in determining whether or not to issue preliminary relief, the appropriate standard for the courts to apply was aptly stated by the Court of Appeals for the Fifth Circuit in *United States* v. *Hayes International Corp.*:

> Where, as here, the statutory rights of employees are involved and an injunction is authorized by statute and the statutory conditions are satisfied as in the facts presented here, the usual prerequisite of irreparable injury need not be established and the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury before obtaining an injunction. *Fleming* v. *Salem Box Co.* 38 F. Supp. 997, 998–99 (D. Ore., 1940); *Western Electric Co., Inc.* v. *Cinema Supplies, Inc.*, 80 F. 2d 106, cert. den. 297 U.S. 717. We take the position that in such a case, irreparable injury should be presumed from the very fact that the statute has been violated. Whenever a qualified Negro employee is discriminatorily denied a chance to fill a position for which he is qualified and has the seniority to obtain, he suffers irreparable injury and so does the labor force of the country as a whole.
>
> Moreover, we hold as did the court in *Vogler* v. *McCarty, Inc.*, 294 F. Supp. 368, 372 (E.D.. La. 1967) affirmed 407 F. 2d 1047 (5th Cir., 1969) that where an employer has engaged in a pattern and practice of discrimination on account of race, et cetera, in order to insure the *full* enjoyment of the rights protected by title VII of the 1954 Civil Rights Act, affirmative and mandatory preliminary relief is required. 415 F. 2d at 1045.

The Commission may not bring an action for preliminary relief until it has issued a complaint. However, in those cases where the need for preliminary relief is serious—including but in no way limited to situations where aggrieved persons are transferred, fired, or otherwise harassed for bringing other charges before the Commission—the Commission is expected to act swiftly in issuing a complaint so that the person aggrieved will not be harmed by a delay between the time his charge is filed and the issuance of the complaint by the Commission.

It is the committee's view that this authority be broadly construed with the view toward completely rooting out and eliminating employ-

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[14-15] *Culpepper* v. *Reynolds Metals Corp.*, 421 F. 2d 888 (C.A. 5, 1970); *United States* v. *Hayes International Corp.*, 415 F. 2d 1038 (C.A. 1969); *Hicks* v. *Crown Zellerbach Corp.*, 49 FRD 184 (D.C. La. 1968). See also Note, "Developments in the Law—Injunctions", 78 Harv. L. Rev. 994 (1965).

ment discrimination. The Commission is to take whatever affirmative steps are needed to provide a full and complete remedy to the aggrieved party or class and to obtain full and immediate compliance with the Civil Rights Act of 1964.

If the Commission finds that no unlawful employment practice has been committed, it would issue an order dismissing the complaint (sec. 706(h)).

ENFORCEMENT AND REVIEW OF COMMISSION ORDERS

Review of a Commission order may be obtained in an appropriate court of appeals upon the petition of an aggrieved party within 60 days of the Commission's order (706(k)). In accordance with the provisions of the Administrative Procedure Act, and established judicial practice, the courts of appeals would review the Commission's record as a whole and would make its determination on an examination of the record to ascertain whether there is substantial evidence to support the agency's findings. In this regard, the committee notes that this is not a second hearing but a review under appellate procedure.

If no petition is filed within 60 days, the Commission's order is conclusive, and an enforcement decree may be obtained by the Commission from the clerk of the court of appeals. This automatic enforcement provision places the burden upon the respondent to seek review (as is the case in regular civil litigation before district courts). The automatic enforcement mechanism also answers the contention that administrative proceedings necessarily involve long delays before a judicial enforcement order can be obtained. It is anticipated that in the vast majority of cases no review will be sought by any party affected by an order, and that the Commission or other person will be able to obtain the enforcement decree of the court without the burden of moving forward with an entire review proceeding.

If, however, the Commission found it desirable in a particular case to seek enforcement before the expiration of the 60-day period provided for a review petition, it would be enabled to do so by section 706(l). This section would, among other things, permit the Commission to apply for a preliminary injunction enforcing its order pending the entry of a final decree.

Finally, if the respondent has not appealed, and if the Commission has not sought enforcement under section 706 (l) or (m), any person entitled to relief under the Commission's order could, after 90 days from service of the Commission's order, also obtain an enforcement decree from the clerk of the court of appeals. (Sec. 706(n).)

The court of appeals, on application of the Commission or any other party to the proceeding, would be authorized to grant preliminary or temporary relief pending disposition of the appeal. This power would exist both in the case of petitions for review by a party (sec. 706(k)) or petitions for enforcement by the Commission (sec. 706(l)).

Decisions of the court of appeals would be subject to review by the Supreme Court of the United States in accordance with 28 U.S.C. 1254 (sec. 706 (k) and (l)).

As provided by section 706(t), as redesignated by this bill, the provisions of the Norris-LaGuardia Anti-Injunction Act (29 U.S.C.

101–115) would not apply to such proceedings for review or enforcement or for preliminary or temporary relief.

The Committee is aware that in the cases of other administrative agencies with quasi-judicial functions the need for obtaining a decree of a U.S. Court of Appeals to enforce an agency order has sometimes resulted in a substantial delay in securing compliance with the order. All too frequently, many months elapse between the date an order is issued by an agency and the date a decree of a U.S. Court of Appeals is entered enforcing it.

We have had no experience with Administration cease and desist orders issued by EEOC. Therefore the Committee does not recommend, at this time, that civil penalties be imposed upon respondents who refuse to obey Commission orders prior to the entry of a decree of the Court of Appeals enforcing such orders. However, the Committee does wish to emphasize the need for prompt action by the Commission to secure enforcement of its orders. In that connection, the Committee expects the Commission will take full advantage of the availability of preliminary relief from the Courts of Appeals, of the summary procedures available in the Courts of Appeals, and the provisions of Rule 38 of the Federal Rules of Appellate Procedure which authorize the imposition of damages and double costs in the case of frivolous appeals.

PRIVATE ACTIONS

The bill contains a provision (sec. 706(q)) that if the Commission dismisses a charge, or, within 180 days of its filing has neither issued a complaint nor entered into a conciliation or settlement agreement which is acceptable to the Commission and the aggrieved party, it shall so notify the aggrieved party. Within 60 days after such notification the person aggrieved, or, in the case of a charge filed by an officer or employee of the Commission, the person or persons named in such charge, shall have the right to commence a private civil action in the appropriate U.S. district court.

The committee is aware that in recent years regulatory agencies have been submerged in increasing workloads which strain their resources to the breaking point. The EEOC is no exception to this problem. As it indicated in testimony, its caseload has increased at a rate which surpasses its own projections. The result has been increasing backlogs in making determinations, and the possibility of occasional hasty decisions, made under the press of time, which have unfairly prejudiced complaints. Accordingly, where the Commission is not able to pursue a complaint with satisfactory speed, or enters into an agreement which is not acceptable to the aggrieved party, the bill provides that the individual shall have an opportunity to seek his own remedy, even though he may have originally submitted his charge to the Commission. It is expected that recourse to this remedy will be the exception and not the rule, particularly once the Commission's enforcement procedures are fully operational. In the meantime, however, the committee believes that the aggrieved person should be given an opportunity to escape the administrative process when he feels his claim has not been given adequate attention.

The committee is concerned, however, about the interplay between the newly created enforcement powers of the Commission and the existing right of private action. It concluded that duplication of proceedings should be avoided. The bill therefore contains a provision for cutoff of the Commission's jurisdiction once the private action has been filed—except for the power to intervene—as well as a cutoff of the right of private action once the Commission issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and the aggrieved party.

If the Commission is able to reach a conciliation or settlement agreement with the respondent, but such agreement is not acceptable to the person aggrieved, the Commission need not proceed with the issuance of a complaint. In such event, the private right of action would be preserved.

The committee also concluded that the aggrieved person's right to institute a private action should be reactivated under certain circumstances if the Commission does not act promptly after issuing a complaint. The bill contains a provision, in section 706(q), that permits the aggrieved person to bring a civil action against the respondent if the Commission has not issued its order within 180 days after issuing the complaint. However, during the period from 180 days to 1 year after issuance of the Commission's complaint, the aggrieved person who files a private action must notify the Commission of such filing, and the Commission may petition the court to stay or dismiss the private action if the Commission shows that it has been acting with due diligence, that it anticipates the issuance of its order within a reasonable period of time, that the proceeding is an exceptional one, and that extension of the Commission's jurisdiction is warranted.

The committee believes that aggrieved persons are entitled to have their cases processed promptly and that the Commission should develop its capacity to proceed rapidly with the hearing and decision on charges once the complaint has issued. Six months is a sufficient period of time for the normal case to be processed from complaint to order, and the Commission should be required to explain to the satisfaction of the court why it needs additional time. Accordingly, when a private action is filed after the 180 day period has elapsed from the issuance of the Commission's complaint, the court ordered delay that is provided for by this section should be the exception rather than the rule, and would not be justified simply because backlogs and inadequate resources have slowed the Commission's work. The primary concern should be to protect the aggrieved person's option to seek a prompt remedy.

It should be noted, however, that it is not the intention of the committee to permit an aggrieved party to retry his case merely because he is dissatisfied with the Commission's action. Once the Commission has issued an order, further proceedings must be in the courts of appeals pursuant to subsections 706(k)–(n).

The committee would also note that neither the above provisions regarding the individual's right to sue under title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws.

SPECIAL ENFORCEMENT PROCEDURE FOR CASES INVOLVING EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

In those cases involving a respondent which is a "government, governmental agency, or political subdivision", and in which EEOC has been unable to secure voluntary compliance as provided under section 706(b) and (f), the bill provides that the Commission shall refer the case to the Attorney General for filing of a civil action against the respondent in the appropriate U.S. district court. A person aggrieved is given the right to intervene in such civil actions.

The committee has no doubt of the need for strong enforcement of equal employment opportunity at all levels of government, and believes that governmental units should lead the way in providing equal opportunity.

Accordingly, the committee bill provides for coverage of State and local government employees and for a concommitant means of enforcement to make that coverage meaningful. By placing the full weight of the U.S. Attorney General and the authority of the U.S. district courts behind equal employment opportunity at the State and local government level, the committee believes that the machinery has been provided to insure State and local leadership in the area of equal employment opportunity.

This enforcement scheme provides the necessary power to achieve results without the needless friction that might be created by a Federal executive agency issuing orders to sovereign States and their localities. In short, the committee believes that the objective of equal employment opportunity can best be achieved by providing this particular means of enforcement where State or local governmental units fail to comply with the law.

FAIRNESS AND DUE PROCESS

Recognizing the importance that the concept of due process plays in the American ideal of justice, the committee wishes to emphasize certain provisions which are included in the bill to insure that fairness and due process are part of the enforcement scheme.

(*a*) *Protection of rights of respondent.*—The bill contains a number of provisions designed to protect fully the rights of the person or persons against whom the charge is filed:

1. The committee retained the requirement that charges be in writing. The Commission must serve the respondent with a notice of the charge, which would advise the respondent of the nature of the alleged violation. As amended by the committee, the bill would require such notice to be served on the respondent within 10 days. (sec. 760 (b)).

2. During the Commission's investigation of the charge, the allegations would not be made public by the Commission, and it would undertake to resolve the matter by informal means before issuing a complaint (sec. 706(b)).

3. If the Commission decides to issue a complaint, it would be served upon the respondent (sec. 706(f)), who would then have a right to file an answer and to amend it with leave of the Commission.

Such leave is to be granted under normal circumstances. The respondent would be a party to the proceedings before the Commission, and he would have a right to appear at any stage of these proceedings, with or without counsel. (Sec. 706 (g).)

4. Hearings of the Commission must be on the record and under the provisions of the Administrative Procedure Act (5 U.S.C. 551, et seq.) (sec. 706(j)). Such proceedings provide the maximum protection of the rights of all parties to the proceedings.

5. The respondent would have the right to seek judicial review of a Commission decision which ruled against him, and he could petition the Supreme Court for certiorari from an unfavorable decision of the court of appeals. (Sec. 706(k).)

(*b*) *Separation of functions.*—The provisions of the bill and title 5 of the United States Code refered to above, would insure that the same persons would not both prosecute and decide cases for the Commission. Section 554(d) of title 5 imposes the following requirements on the operations of administrative agencies, such as the Commission, whose decisions must be made after hearing and on the record:

1. The person presiding at the reception of evidence (typically, the hearing examiner) may not be responsible to or subject to the supervision or direction of any person engaged in the performance of investigative or prosecuting functions.

2. An employee of the agency performing investigative or prosecution functions in a particular case may not participate in or advise in the decision, recommended decision, or agency review in that or a factually related case, except as a witness or as counsel in public proceedings.

The net effect of these provisions would be to prevent the intermingling of functions within the Commission.

(c) *Protection of rights of person aggrieved*—In addition to the provisions already discussed involving the individual right to sue, the rights of persons claiming to be aggrieved would be further protected by the following provisions:

1. Charges may be filed by or on behalf of an aggrieved person. The Commission is directed to make its findings on reasonable cause as promptly as possible, and so far as practicable, within 120 days of the filing of the charge. The committee, as noted above, considers prompt action on charges and complaints to be a major responsibility of the Commission in all cases. The existing 90-day time limitation on filing a charge has been extended by 90 days (sec. 706(e)).

2. If the Commission finds no reasonable cause to believe that the charge is true, or enters into a settlement which is not acceptable to the aggrieved person, the aggrieved person would still have a right of action against the respondent.

3. The aggrieved person would have a right to be a party to all proceedings before the Commission and to be represented by counsel of his choosing if he desires. Particularly at the hearing stage, the guarantees of administrative due process as provided by the Administrative Procedure Act should be scrupulously maintained. As one authority has pointed out:

> The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action

> should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts . . ." 1 K. Davis, *Treatise on Administrative Law* 412.

The right of a person to participate at the hearing stage through his own counsel is intended to supplement or complement, but in no way to replace, the traditional advocate role of the representatives of the Commission charged with carrying forward the complaint.

Provisions of present law requiring that the person aggrieved be notified of his rights have been retained. Especially in light of the further safeguards in this bill, the Commission is expected, at the commencement and at other appropriate stages of the proceedings, to fully notify the aggrieved person in clear and understandable fashion of the various procedural rights and steps open to him. Too often a person files a charge but then blunders along lost in the bureaucratic process. The committee believes that further steps should be taken, including perhaps followup notification, to ensure that an aggrieved person knows at apropriate times the status of the case and his rights under the law.

(d) *"Commissioner's complaint" provision*—The provision permitting a member of the Commission to file a charge of unlawful employment practice as contained in the present section 706 was amended by the committee to provide for such charges to be made by an officer or employee of the Commission upon the request of any person claiming to be aggrieved. The original bill had continued the Commissioner's charge but would have barred the Commissioner filing the charge from participating in a hearing except as a witness. The committee concluded that this provision might cause some appearance of conflict of interest if Commissioners were to hear charges placed by a colleague; moreover the Commission's caseload might not permit the routine disqualification of Commissioners who had placed charges.

Placing the authority to make a charge at a lower level of the Commission, however, would accomplish the same purposes while avoiding these problems.

The purpose of this provision is to enable aggrieved persons to have charges processed under circumstances where they are unwilling to come forward publicly for fear of economic or physical reprisals. In this connection the committee wishes to make clear that the device of a Commission charge may be used to maintain the confidential identity of the persons aggrieved and that no disclosure need be made of the identity of the person aggrieved at any stage of the proceeding unless it is voluntary or in such circumstances where the person aggrieved is required to be a witness.

This section is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that title VII actions are by their very nature class complains,[16] and that any restriction on such actions would greatly undermine the effectiveness of title VII.

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[16] *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (C.A.5, 1968). Cf. *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (C.A. 5, 1968); *Blue Bell Boots* v. *EEOC*, 418 F. 2d 355 (C.A. 6, 1969); *Local 104, Sheet Metal Workers* v. *EEOC*, 303 F. Supp. 528 (N.D. Calif. 1969). Similarly, labor organizations may also petition for relief on behalf of their members. *Chemical Workers* v. *Planters Manufacturing Co.*, 259 F. Supp. 365 (N.D. Miss. 1965); *Pulp Sulphite and Paper Mill Workers, Local 186* v. *Minnesota Mining & Manufacturing Co.*, 304 F. Supp. 1284 (N.D. Ind. 1969).

CONSOLIDATION OF ANTI-DISCRIMINATION ENFORCEMENT ACTIVITIES

(a) *Transfer of "Pattern or Practice" Cases to EEOC.*—The authority to bring "pattern or practice" suits directly in the district courts, as provided by section 707 of the present law, is amended by section 5 of the bill which transfers the present section 707 functions from the Attorney General to the Commission.

While the broad-scale actions against any "pattern or practice" of discrimination that have been brought by the Justice Department under section 707 of the Civil Rights Act of 1964, have been an integral and important part of the overall Federal effort to combat discrimination, the committee believes that with the enactment of legislation providing the Commission with effective power to enforce title VII, the further retention of section 707 power in the Department of Justice is not necessary. With the adoption of this bill, which includes the transfer to the Commission of the functions of the Office of Federal Contract Compliance (OFCC) and the functions of the Department of Justice, the Federal Government, through the procedures of the Commission, will be able to pursue a unified program of attack upon all elements of employment discrimination.

Employees would benefit by having to look to only one agency to obtain relief; employers similarly would be free from the burden of multiple investigations examining their employment policies and personnel records in response to similar or identical complaints filed with different agencies.[17]

Similarly, the duplication of effort that would inevitably result from similar pursuits of identical complaints, with the appurtenant double expense and unnecessary waste of scarce legal talent, is something the committee wishes to avoid by effecting the transfer.

In providing for the transfer of the authority under section 707, the committee has, however, retained jurisdiction in the Department of Justice for the first 2 years after enactment of the bill to bring "pattern or practice" suits where necessary. The committee believes that this will safeguard the important "pattern or practice" power, while at the same time providing for a smooth and efficient transfer of that authority.

The committee recognizes that with the institution of the new enforcement powers, the Commission will have to undertake extensive internal reorganization, and will have to cope with its present backlog and the press of incoming cases at the same time. In light of this, the Commission may not be able to fully utilize the "pattern or practice" function immediately. It is expected, however, that the two agencies will exercise concurrent jurisdiction over "pattern or practice" enforcement during the first 2 years of operation under the new law, since the committee intends that the Commission's administrative cease-and-desist enforcement authority will not be used exclusively to resolve individual complaints but will also include the elimination of "patterns or practices" of discrimination wherever its inves-

[17] For an example of a situation where several Government agencies were all involved in essentially the same complaint, see *Local 189, United Papermakers and Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980 (C.A. 5 1969), *cert. denied* 397 U.S. 919 (1970), aff'g 282 F. Supp. 39 (E.D. La. 1968) and 301 F. Supp. 906 (E. D. La. 1969). In this particular case, conclusions as to the legality of a seniority system used by the respondent were reached by the EEOC, the OFCC, and the Department of Justice, with separate investigations and litigation employed by each agency independent of the other.

tigation of a charge discloses the existence of such employment situations.

In this regard, the committee believes that it is incumbent upon the Attorney General and the Commission to cooperate and consult whenever necessary to insure the maximum use of these legal tools to end employment discrimination, as well as to avoid duplication of effort and conflicting approaches to the implementation of the statute.

The committee also believes that the future transfer of the "pattern or practice" authority should not be a burden upon the already meager resources of the Commission. Accordingly, the committee has provided that along with the transfer of the functions, there would also be a transfer of the funds and personnel positions previously budgeted for this work in the Department of Justice.

(b) *Transfer of Contract Compliance activities to EEOC.*—Section 715 of the bill transfers the powers and duties of the Secretary of Labor under Executive Order 11246 (as amended by Executive Order 11375) to the Equal Employment Opportunity Commission.

Executive Order 11246 enunciates the policy of the Government of the United States ". . . to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, color, religion, sex, or natural origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency . . ." (E.O. 11246 § 101 as amended). The Executive order program is presently administered within the Department of Labor by the Office of Federal Contract Compliance, a division of the Employment Standards Administration. Under the Executive Order, government contractors and subcontractors are required to agree to the following contract provision:

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

The Secretary of Labor has overall responsibility for administration of the Executive Order, including ultimate authority over the contracting agencies in the implementation of both the nondiscrimination and the affirmative action provisions of the contract clause.

The bill transfers all of the functions of the Secretary of Labor under the Executive Order to EEOC without modifying in any way those functions or relieving, in any way, government contracting agencies or government contractors of their obligations thereunder.

This transfer was considered by the Committee last year during its deliberation on S. 2453. In the report on S. 2453, the bases for then not transferring the program included a concern that the Commission might be overburdened and that a complete consolidation of all agencies was not necessarily appropriate at that time. The report, however, made clear that the credibility of the executive order program was very much suspect and so stated:

> However, the committee also believes that an adequate job of providing equal employment opportunity has not, and is

> not, being provided through the Federal Procurement function. There has been far too much non-public discussion and negotiation and far too few understandable results. In many instances the Department's claim that something major happened, when measured against the demonstration that something actually happened, is grossly lacking in the clarity that the public and minorities can understand.

The United States Commission on Civil Rights, in October 1970, recommended transferring of "the Contract Compliance responsibilities of OFCC" to EEOC in order to achieve a consolidation of equal employment oportunity functions into a single, independent agency. This recommendation was reconfirmed by the Commission in April 1971, and again in testimony before the Committee on S. 2515, by Father Theodore Hesburgh, Chairman of the Civil Rights Commission.

During testimony on this bill, the Department of Labor vigorously opposed the transfer citing legal standards, substantive results, and procurement considerations as support of its position.

The Committee was not persuaded that any of the three reasons warrant maintenance of the programs with the Secretary of Labor. The question of whether differing legal standards apply to EEOC and OFCC has been the subject of much discussion both before and since the hearings. Suffice it to say that the courts are developing the body of case law rationalizing the relationship between Title VII and the Executive Order program.[18]

The Committee intends that the standards applicable under Title VII shall govern all proceedings under that Title. Furthermore, the Committee intends that EEOC shall exercise the same authority under the Executive Order as has governed OFCC, being limited by the standards applicable to Execctive Order 11246. The Committee believes that both these functions, though somewhat different in nature, can be fulfilled effectively by EEOC. Of course, in neither case, can an employer be required to violate Title VII.

The procurement considerations are minimal. The Secretary of Labor has acted in essentially a directive or supervisory role *vis-a-vis* the procurement agencies—no change is contemplated by this transfer. The Committee expects that the main burden of obtaining compliance with the executive order will still rest with the contracting agencies.

The question raised last year was whether the program has had substantive results. Unfortunately, the paucity of credible achievement cited last year is still the rule. The successes described in the testimony suffer from an inability of the program managers to furnish reliable data to support their claim. The program looks good on paper, but despite many opportunities very minimal information was furnished to the Committee that would support the contention that significant results have been achieved. To the contrary, in the history of the Contract Compliance Program, until two days after introduction of this bill, no sanction had ever been imposed for violation of the

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[18] *Contractors Ass'n. of Eastern Penna.* v. *Secretary of Labor*, 442 F.2d 1959 (3d Cir. 1971), cert. denied — U.S. — (1971). See also the cases cited at for. 17, *Supra.*

Executive Order. Since then, only one small contractor (10 employees) has been subjected to sanctions.

In 1969, then Secretary of Labor Shultz, testifying before this Committee asked for time for the new administration to get its House in order. The Department's testimony this year suggested that real success is just around the corner.

The rights of minorities and women are too important to continue this important function in an agency that has not really been able to achieve the promised results. The contract compliance program is an important and viable tool in the government's efforts to achieve equal employment opportunity. It should have a chance to operate in a fresh atmosphere with an agency that has Equal Employment Opportunities as its sole priority.

CHANGES IN RECORDKEEPING REQUIREMENTS

Section 709 is revised to provide a more effective system for requiring records to be kept, to permit the Commission to arrange for appropriate operating agreements with State and local fair employment practice agencies, to provide a scheme for avoiding duplication of records, and for agreements to share information with Federal, State, and local agencies.

The committee believes strongly that adequate records are essential to the proper and effective administration of this Title. However, it is also mindful of the increasing burdens that employers and unions are faced with under the proliferation of statutes and regulations which affect them. Therefore, the committee urges the Commission to undertake serious efforts to ease the paperwork requirements under this act consistent with maximum efforts to secure complete compliance with the law.

EXPANSION OF COMMISSION MEMBERSHIP

The bill contains two provisions (Secs. 705(a) and 713(d)) designed to help the Commission deal promptly with the huge volume of cases expected to come before it for decision upon the enactment of this bill. These provisions authorize the President, at the request of the Chairman of the Commission, to appoint up to four additional members of the Commission by and with the advice and consent of the Senate, and permit the Commission itself to sit in panels of three members.

As has already been noted in this report, the number of charges filed with the EEOC during the past several years has exceeded all expectations at the time the Civil Rights Act of 1964 was enacted. Furthermore, the volume of charges continues to increase, with over 32,000 charges expected to be filed during the current fiscal year.

While it is impossible to state with assurance at this time what the workload of the Commission will be, the Committee believes that authorization for additional Commissioners and the use of three-member panels should provide sufficient flexibility for the Commission to manage its caseload expeditiously.

EFFECTIVE DATE

The provisions of this bill would be effective upon enactment. However, under the terms of the bill's amendment to section 701 of the

Civil Rights Act of 1964, the expansion of title VII's coverage to employers with eight or more employees, and to unions with eight or more members, would not be operative until 1 year after enactment.

ESTIMATE OF COSTS

In accordance with the requirements of section 252 of the Legislative Reorganization Act of 1970, the Commission has prepared an estimate of the projected costs for the new areas of enforcement activity for which the bill provides. It is the committee's view that the accompanying figures represent a reasonable estimate of the minimum additional budgetary requirements for administration of these new undertakings:

[In thousands]

	Fiscal year—				
	1972	1973	1974	1975	1976
Cease and desist operations under present jurisdictional limits	9,431	11,912	12,081	12,123	12,151
Extension of jurisdiction to State and local government employees	2,100	3,000	3,000	3,000	3,000
Extension of jurisdiction to 8 or more employees	(1)	1,234	2,115	4,034	4,243
Total	12,031	17,046	18,096	20,057	20,294

[1] Not effective.

The bill also contains provisions for the transfer of two activities presently administered by different agencies of the Government. As the transfer of these activities also involves transfer of funds and personnel positions allocated to those agencies, the cost estimates for these activities are based upon cost projections by the agencies presently administering those operations:

[In thousands]

	Fiscal year—				
	1972	1973	1974	1975	1976
OFCC functions	2,594	2,600	2,600	2,600	2,600
Pattern or practice enforcement	1,800	1,800	1,800	1,800	1,800

The figures provided in both the above tables are based on projections of anticipated case loads and estimates of the level of enforcement activity which will be needed. Because of the uncertain nature of these factors it is impossible to attempt any realistic projection beyond FY 1976.

TABULATION OF VOTES IN COMMITTEE

Pursuant to section 133(b) of the Legislative Reorganization Act of 1946, as amended, the following tabulation of votes in committee is provided.

1. Senator Dominick's substitute amendment to strike from the bill the transfer to EEOC of authority to bring "pattern or practice" cases (defeated 14 to 1):

YEAS—1

Mr. Dominick

NAYS—14

Mr. Williams
Mr. Randolph
Mr. Pell
Mr. Nelson
Mr. Mondale
Mr. Eagleton
Mr. Cranston
Mr. Hughes
Mr. Stevenson
Mr. Javits
Mr. Schweiker
Mr. Packwood
Mr. Taft
Mr. Stafford

2. Senator Eagleton's amendment to delay the transfer of the "pattern or practice" authority for two years, to provide for the concurrent jurisdiction in the EEOC of such pattern or practice cases, and to make sure transfer subject to the President's exercise of authority under the Reorganization Act (adopted 13 to 2):

YEAS—13

Mr. Williams
Mr. Randolph
Mr. Pell
Mr. Nelson
Mr. Mondale
Mr. Eagleton
Mr. Cranston
Mr. Hughes
Mr. Stevenson
Mr. Javits
Mr. Schweiker
Mr. Packwood
Mr. Stafford

NAYS—2

Mr. Dominick
Mr. Taft

3. Senator Dominick's amendment to substitute court enforcement for administrative cease-and-desist authority (defeated 15 to 2):

YEAS—2

Mr. Dominick
Mr. Beall

NAYS—15

Mr. Williams
Mr. Randolph
Mr. Pell
Mr. Kennedy
Mr. Nelson
Mr. Mondale
Mr. Eagleton
Mr. Cranston
Mr. Hughes
Mr. Stevenson
Mr. Javits
Mr. Schweiker
Mr. Packwood
Mr. Taft
Mr. Stafford

4. Senator Williams' motion that the committee favorably report S. 2515, as amended (adopted 17 to 0):

YEAS—17

Mr. Williams
Mr. Randolph
Mr. Pell
Mr. Kennedy
Mr. Nelson
Mr. Mondale
Mr. Eagleton
Mr. Cranston
Mr. Hughes
Mr. Stevenson
Mr. Javits
Mr. Dominick
Mr. Schweiker
Mr. Packwood
Mr. Taft
Mr. Beall
Mr. Stafford

SECTION-BY-SECTION ANALYSIS

SECTION 2

This section amends certain definitions in section 701 of the Civil Rights Act of 1964.

Section 701(a).—This subsection defines "person" to include State and local governments, governmental agencies and political subdivisions.

Section 701(b).—This subsection would extend coverage of employers to those with 8 or more employees one year after enactment. The standard for determining the number of employees of an employer, that is, "employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year," would apply to employers of 25 or more employees during the first year as well as the final coverage of eight or more employees. This subsection would broaden the meaning of "employer" to include State and local governments and the District of Columbia departments or agencies (except those subject by statute to procedures of the Federal competitive service as defined in 5 U.S.C. 2102, who are covered by section 717, as are all Federal employees).

Section 701(c).—This subsection eliminates the exemption for agencies of the United States, States or political subdivisions of States from the definition of "employment agency" in order to conform with the expanded coverage of State and local governments in section 701(a) and (b). State employment services, previously covered by reference to the United States Employment Service, continue to be covered as part of the State or local government coverage. Employees of the United States Employment Service, as Federal employees, are covered by the new section 717 of the act.

Section 701(e).—This subsection is revised to include coverage of labor organizations with 8 or more members one year after enactment.

SECTION 3

Section 702 is amended to eliminate the exemption for employment of individuals engaged in educational activities of non-religious educational institutions. It continues the exemption for employment of aliens outside the United States and for a religious corporation, association, educational institution or society with respect to employment of individuals of a particular religion to perform work connected with religious activities.

SECTION 4(a)

This section amends sections 706 (a)–(e) of the Civil Rights Act of 1964 entitled "Prevention of Unlawful Employment Practices."

Section 706(a).—This subsection would empower the Commission to prevent persons from engaging in unlawful employment practices

under sections 703 and 704 of title VII of the Civil Rights Act of 1964.

Section 706(b).—This subsection prescribes the procedures to be followed when a charge of an unlawful employment practice is filed with the Commission. The Commission must serve a notice of the charge on the respondent within ten days, investigate the charge and make its determination on whether there is reasonable cause to believe that the charge is true. It is not the intent of the committee that failure to give notice within ten days should prejudice the rights of an aggrieved party. If it finds no reasonable cause, the Commission must dismiss the charge; if it finds reasonable cause, it must attempt to conciliate the case. The subsection makes a number of changes in existing law:

1. Under present law, a charge may be filed only by a person aggrieved under oath or by a member of the Commission where he has reasonable cause to believe a violation has occurred. This subsection is amended to permit a charge to be filed by or on behalf of a person aggrieved or by an officer or employee of the Commission upon the request of a person claiming to be aggrieved.

2. The Commission would be required to make its determination on reasonable cause as promptly as possible and, "so far as practicable," within 120 days from the filing of the charge or from the date upon which the Commission is authorized to act on the charge under section 706(c) or (d). The Commission is required in its determination of reasonable cause to accord substantial weight to final findings and orders made by State or local authorities under State and local laws.

3. This subsection and section 8(c) of the bill add appropriate provisions to carry out the intent of the present statute to provide full coverage for joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training programs. While these joint labor-management committees are prohibited under section 703(d) of the present act from discriminating, they were not expressly included in the prohibition against discriminatory advertising or retaliation against persons participating in Commission proceedings (sec. 704(a) and (b)) or in the procedures for filing charges in section 706(a).

Section 706(c).—This provision retains the present requirement that the Commission defer for a period of 60 days to State or local agencies functioning under appropriate anti-discrimination laws (or 120 days during the first year after the effective date of such law). The only change in the present law is to delete the phrase "no charge may be filed" with the Commission by an aggrieved person in such State or locality. The present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language clarifies the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the prescribed period has elapsed.

Section 706(d).—This subsection requires deferral to State or local anti-discrimination agencies in the case of charges filed by an officer or employee of the Commission.

Section 706(e).—This subsection prescribes the time limits for the filing of a charge. Under the present statute, the charge must be filed within 90 days after the alleged unlawful employment practice

occurred. In cases where the Commission defers to a State or local agency, the charge must presently be filed within 210 days of the occurrence of the alleged unlawful practice, or within 30 days after the person aggrieved receives notice that the State or local agency has terminated its proceedings, whichever is earlier. This subsection would permit charges to be filed within 180 days of the alleged unlawful practice—a limitation period similar to that contained in the Labor-Management Relations Act, as amended (29 U.S.C. 160(b)). Where the Commission defers to a State or local agency, the time limit is extended to 300 days after the occurrence of the alleged unlawful practice or 30 days after receipt of notice that the State or local agency has terminated its proceedings. This subsection also requires that notice of the charge be served on the respondent within ten days after its having been filed.

Sections 706(f) through 706(p).—These subsections, which are new, set forth the procedure to be followed where the Commission, after finding reasonable cause to believe that the allegations of the charge are true, is unable to conciliate the case. The hearing and review requirements are similar to those found in most statutes governing administrative agencies.

Section 706(f).—Under this subsection, if the Commission is unable to secure a conciliation agreement pursuant to section 706(b) that is acceptable to the Commission, it would promptly issue and serve upon the respondent a complaint and notice of hearing if the respondent is not a government, governmental agency or political subdivision. In the latter case, if conciliation fails, the Commission will take no further action and refer the case to the Attorney General for filing a civil action in the district courts. Such civil actions are to be governed by sections 706 (q) through (w), as applicable. The Commission's determination that it is unable to secure such an agreement would not be reviewable in court. Conciliation agreements entered into by the Commission would be enforceable in court in accordance with the provisions of section 706(l). If an officer or employee of the Commission files a charge, he shall not participate in a hearing in any complaint arising out of such charge, except as a witness.

Section 706(g).—This subsection prescribes certain statutory procedural requirements after a complaint is issued by the Commission. The respondent would be provided an opportunity to file an answer to the complaint, and to amend its answer upon a showing of reasonableness and fairness. The respondent and the aggrieved person are full parties and are permitted to appear at any stage of the proceeding. The Commission could also, in its discretion, grant to other persons the right to intervene, to file briefs, or to make oral argument, as it deems appropriate. Testimony at hearings must be under oath and reduced to writing and proceedings shall, so far as practicable, be conducted in accordance with the rules of evidence in the district courts of the United States. This last provision is similar to that contained in the Labor-Management Relations Act (29 U.S.C. 160(b)). As specified in section 706(j), all hearings must be conducted in accordance with the Administrative Procedure Act. The only persons, in addition to members of the Commission, who may preside at hearings are hearing examiners appointed under section 3105 of title 5 of the United States Code.

Section 706(h).—The subsection provides that if the Commission, following a hearing, finds that the respondent has engaged in an unlawful employment practice, it shall state its findings of fact and issue an order to be served on the parties, requiring that the respondent cease and desist from its unlawful conduct and take such affirmative action, including reinstatement or hiring of employees, with or without back pay as will effectuate the policies of the Act. Interim earnings or amounts earnable with reasonable diligence by the aggrieved persons would operate to reduce the back pay otherwise allowable. If any event back pay liability is limited to two years prior to the filing of a charge with the Commission. The order could also require that the respondent make reports from time to time to the Commission. If the Commission finds no unlawful employment practice, it would state such findings and issue an order dismissing the complaint. The provision is intended to give the Commission wide discretion in fashioning the most complete relief possible to eliminate all of the consequences of the unlawful employment practice caused by, or attributable to, the respondent.

Section 706(i).—This subsection would make clear the authority of the Commission, any time after a charge has been filed until the record is filed in court, to end proceedings by agreement with the respondent for the elimination of the alleged unlawful employment practice. Agreements entered into under this section or section 706(f) would be enforceable in the appropriate court of appeals under section 706 (l) through (n). The Commission would also be able, upon reasonable notice, to modify or set aside, in whole or in part, any finding or order made or issued by it. The right of the aggrieved person to file a civil action is preserved in section 706(q)(2) in those cases where the aggrieved person is not a party to the agreement.

Section 706(j).—This subsection requires that findings of fact and orders made or issued under subsection (h) or (i) be on the record in accordance with the Administrative Procedure Act.

Section 706(k).—This subsection would permit a party aggrieved by a final order of the Commission—the respondent or the person or persons on whose behalf the charge was filed—to seek review of such order in a U.S. court of appeals within 60 days after the service of the Commission's order. The subsection specifies the procedures to be followed after a petition for review is filed, including:

(1) The clerk of the court transmits a copy of the petition to the Commission and to any other party to the proceeding before the Commission;

(2) The Commission files in court the record in the proceedings pursuant to 28 U.S.C. 2112 at which time the court of appeals has exclusive jurisdiction;

(3) The Court of Appeals is authorized to grant such temporary relief, restraining order, or other orders as it deems just and proper and may enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Commission. The findings of fact by the Commission are conclusive if they are supported by substantial evidence on the record considered as a whole;

(4) Any party to the proceedings before the Commission may intervene in the court of appeals and a party may apply for leave

to adduce additional evidence before the Commission, which could then modify its original findings. Modified findings would also be conclusive if supported by substantial evidence on the record considered as a whole;

(5) Objections not urged before the Commission, its member, or agent, will not be considered by the court unless the failure or neglect to urge such objection is excused because of extraordinary circumstances;

(6) Commencement of proceedings under this subsection would not stay the Commission's order unless ordered by the court; and

(7) The courts of appeals are required to hear petitions expeditiously. This requirement is intended to emphasize to the courts of appeals the need for promptly acting on petitions in order to have speedy resolution of these cases.

Section 706(l).—This subsection would authorize the Commission to petition a U.S. court of appeals for enforcement of its order. The prescribed procedures in the case of petitions for enforcement under this subsection are similar to section 706(k) except that no time limit is specified for the enforcement petition other than that provided by section 706(m) regarding the self-enforcement procedure. The Commission would be authorized to seek an order from the court for temporary or preliminary enforcement of its order pending complete review by the court of appeals.

Section 706(m).—Under this subsection, if there is no petition for review filed within 60 days as provided in section 706(k), the Commission's findings of fact and order would become conclusive in connection with any petition for enforcement filed pursuant to section 706(1). If the Commission petitions for an enforcement order thereafter, the clerk of the court of appeals would enter a decree enforcing the order of the Commission and transmit copies to the Commission, the respondent, and any other parties to the proceeding before the Commission.

Section 706(n).—This subsection provides that any person entitled to relief under a Commission order could obtain enforcement of the order if within 90 days after service of the Commission's order there has been no petition for review filed under subsection (k) or no petition for enforcement filed by the Commission under subsections (l) or (m). The procedures and provisions of subsection (m) would apply to such petition for enforcement.

Section 706(o).—This subsection provides that the Attorney General would conduct all litigation to which the Commission is a party in the Supreme Court of the United States pursuant to this title. All other litigation, except that relating to governments, governmental agencies, and political subdivisions which is conducted by the Attorney General, including litigation arising under sections 706 (k), (l), (m), (n), (p), (q), or 707, litigation arising in connection with the Commission's record-keeping requirements under section 709, the enforcement of the Commission's authority to conduct investigations under section 710, and private litigation in which the Commission is involved as amicus curiae, as well as judicial proceedings in which the Commission intervenes, shall be conducted by attorneys appointed by the Commission.

Section 706(p).—Under this subsection, if, after a charge is filed under section 706(b), the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to preserve its power to grant effective relief in the proceeding, it must bring an action for appropriate preliminary or temporary relief in the United States district court in the judicial district in which the unlawful employment practice is alleged to have been committed, where the person would have been employed but for the alleged unlawful practice, or if the respondent is not to be found in any of these districts, in the judicial district where the respondent has its principal office. The subsection further provides that for purposes of 28 U.S.C. 1404 and 1406 (which permit the court to transfer an action to another judicial district where the action might have been brought) the district in which the respondent has his principal office is to be considered a judicial district where the action might have been brought.

This subsection, in addition, would make rule 65 of the Federal Rules of Civil Procedure, except paragraph (a)(2) thereof, applicable to proceedings under section 706(p). Rule 65 prescribes procedural requirements for the granting of temporary restraining orders and preliminary injunctions. Paragraph (a)(2) of rule 65 permits the court to advance the trial of the merits and to consolidate the trial on the merits with the hearing on the application for injunction. This provision would be inapplicable to proceedings under section 706(p).

Any relief ordered by the court under this subsection would be permitted to run until such time as a court of appeals has assumed jurisdiction of a review or enforcement petition.

Section 706(q).—This subsection preserves the private right of action by an aggrieved person. Under this subsection, the aggrieved person may bring such an action within 60 days after being notified by the Commission that it has dismissed the charge, or when 180 days have elapsed from the filing of the charge without the Commission having issued a complaint under section 706(f) or the Attorney General having filed a civil action under section 706(f) or without the Commission having entered into an agreement under section 706 (f) or (i) to which the person aggrieved is a party.

The subsection would also divest the Commission of jurisdiction over any pending proceedings upon the filing of a private action. Conversely, the right of an aggrieved party to bring a private action would terminate once the Commission issued a complaint under subsection 706(f), or the Attorney General filed a civil action under subsection 706(f), or the Commission entered into a conciliation agreement under subsection 706 (f) or (i) to which the person aggrieved is a party. If the Commission does not issue an order within 180 days after it issues a complaint or within 60 days after receipt of notice in the case of an agreement under subsection (i) to which the person aggrieved is not a party, the aggrieved person may also institute a civil action. If such action is instituted within one year of the issuance of the Commission's complaint, the Commission may request that it be stayed or dismissed upon a showing that it has been acting with due diligence, that it anticipates issuance of an order within a reasonable time on the complaint, that the case or proceeding is exceptional and that extension of exclusive jurisdiction of the Commission is warranted.

SECTION 4 (b) AND (d)

These sections redesignate the paragraph numbers of subsections 706(e) through (k) of the Civil Rights Act of 1964 as subsections 706(q) through (w), and also redesignate other paragraph numbers to be consistent with the changes made in section 706.

Section 4(c).—This section adds a sentence to subsection 706(r) which clarifies the power of the district courts to grant temporary relief in civil actions brought under title VII.

SECTION 5

This section amends section 707, concerning the Attorney General's "pattern or practice" action, to provide for a transfer of this function to the Commission two years after the enactment of the bill. The bill further provides for concurrent "pattern or practice" jurisdiction for the Commission from the date of enactment until the transfer is complete. The transfer is subject to change in accordance with a Presidential reorganization plan if not vetoed by Congress. The section would provide that currently pending proceedings would continue without abatement, that all court orders and decrees remain in effect, and that upon the transfer the Commission would be substituted as a party for the United States of America or the Attorney General as appropriate. The Commission would have authority to investigate and act on pattern or practice charges except that any action would follow the procedures of section 706.

SECTION 6

This section amends section 709 of the Civil Rights Act of 1964, entitled "Investigations, Inspections, Records, State Agencies."

Section 709(a).—This subsection, which gives the Commission the right to examine and copy documents in connection with its investigation of a charge, would remain unchanged.

Section 709(b).—This subsection would authorize the Commission to cooperate with State and local fair employment practice agencies in order to carry out the purposes of the title, and to enter into agreements with such agencies, under which the Commission would refrain from processing certain types of charges or relieve persons from the recordkeeping requirements. This subsection would make two changes in the present statute. Under this subsection, the Commission could, within the limitations of funds appropriated for the purpose, also engage in and contribute to the cost of research and other projects undertaken by these State and local agencies and pay these agencies in advance for services rendered to the Commission. The subsection also deletes the reference to private civil actions under section 706(e) of the present statute.

Section 709(c).—This subsection, like the present statute, would require employers, employment agencies, labor organizations, and joint labor-management apprenticeship committees subject to the title to make and keep certain records and to make reports therefrom to the Commission. Under the present statute, a party required to keep records could seek an exemption from these requirements on the

ground of undue hardship either by applying to the Commission or bringing a civil action in the district court. This subsection would require the party seeking the exemption first to make an application to the Commission and only if the Commission denies the request could the party bring an action in the district court. This subsection would also authorize the Commission to apply for a court order compelling compliance with the recordkeeping and reporting obligations set forth in the subsection.

Section 709(d).—This subsection would eliminate the present exemption from recordkeeping requirements for those employers in States and political subdivisions with fair employment practice laws or for employers subject to Federal executive order or agency recordkeeping requirements. Under this subsection, the Commission would consult with interested State and other Federal agencies in order to coordinate the Federal recordkeeping requirements under section 709(c) with those adopted by such agencies. The subsection further provides that the Commission furnish to such agencies information pertaining to State and local fair employment agencies, on condition that the information would not be made public prior to the institution of State or local proceedings.

Section 709(e).—Under this subsection, the Commission or the Attorney General would have the authority to direct the person having custody of any record or paper required by section 709(c) to be preserved or maintained to make such record or paper available for inspection or copying by the Commission or the Attorney General. The district court of the judicial district where the demand is made or the papers are located would have jurisdiction by appropriate process to compel the production of such record or paper. The subsection further provides that the members of the Commission and its representatives or the Attorney General and his representatives, could not, unless ordered by the court, disclose any record or paper produced except to Congress or a congressional committee, to other government agencies, or in the presentation of cases before a court or a grand jury.

SECTION 7

This section would amend section 710 of the Civil Rights Act of 1964 to make section 11 of the National Labor Relations Act (29 U.S.C. 161), except for one provision thereof, applicable to Commission investigations. This section would require the Commission or a member thereof, upon application of a party, to issue a subpoena requiring the attendance and testimony of a witness or the production of any evidence in a proceeding. The person served with the subpoena could petition the Commission to revoke the subpoena within 5 days. On application of the Commission, an appropriate district court could order a person to obey a subpoena and failure to comply with the court order would be punishable in contempt proceedings.

Under this section, the Commission would not be authorized to issue a subpoena on the application of a private party before it issues a complaint and notice of hearing. This provision, which is in accord with the actual practice of the National Labor Relations Board,

would give the Commission exclusive authority to conduct the prehearing investigation.

Section 11 of the National Labor Relations Act also contains provisions relating to privileges of witnesses, immunity from prosecution, fees, process, service, and return, and information and assistance from other agencies.

SECTION 8 (a) AND (b)

These subsections would amend sections 703(a)(2) and 703(c)(2) of the present statute to make it clear that discrimination against applicants for employment and applicants for membership in labor organizations is an unlawful employment practice. This subsection would merely be declaratory of present law.

SECTIONS 8(C) (1) AND (2)

These subsections would amend section 704 (a) and (b) of the present statute to make clear that joint labor-management apprenticeship committees are covered by those provisions which relate to discriminatory advertising and retaliation against individuals participating in Commission proceedings.

SECTION 8(d)

This subsection would amend section 705(a) of the present statute to provide for the appointment of up to four new Commission members at any time after one year from the effective date of the act at the request of the Chairman, and at the discretion of the President with the advice and consent of the Senate. Not more than the least number of members sufficient to constitute a majority may be of the same political party.

Further, this subsection would amend section 705(a) of the present statute to permit a member of the Commission to serve until his successor is appointed but not for more than 60 days when Congress is in session unless the successor has been nominated and the nomination submitted to the Senate, or after the adjournment sine die of the session of the Senate in which such nomination was submitted.

The rest of the subsection is substantially the same as present section 705(a) and would make the Chairman of the Commission, on behalf of the Commission, responsible for the administrative operations of the Commission and for the appointment of officers, agents, attorneys, hearing examiners and other employees of the Commission in accordance with Federal law.

SECTION 8(e)

This subsection would amend section 705(g)(1) of the present act to permit the Commission to accept uncompensated services. It is intended to permit the Commission to utilize these services for such purposes as education, publicity, and the collection of data. It would not be expected to accept such services in connection with the prosecution or decision of cases before it except in extraordinary situations.

SECTION 8(f)

This subsection would eliminate the provision in present section 705(g) authorizing the Commission to request the Attorney General to intervene in private civil actions and instead permit the Commission itself to intervene in such civil actions as provided in section 706(q).

SECTION 8(g)

This subsection would, subject to certain exceptions, permit the Commission to delegate any of its functions, duties and powers to such persons as it may designate by regulation. A number of other agencies have broad authority to delegate functions; for example, the Securities and Exchange Commission (15 U.S.C. 78d–1), the Interstate Commerce Commission (49 U.S.C. 17(5)), and the Federal Communications Commission (47 U.S.C. 155(d)). The exceptions are as follows:

(1) The Commission could not delegate its powers to make decisions on the merits after administrative hearings under section 706(h) or to modify or set aside its findings or make new findings under section 706(i), (k), and (l). However, like the National Labor Relations Board (29 U.S.C. 153(b)), the Commission would be authorized to delegate this power or any of its other powers to groups of three or more members of the Commission;

(2) The Commission could not delegate its authority under section 713(c) to make rules of general applicability. A similar limitation is imposed on the Securities and Exchange Commission (15 U.S.C. 78d–1(a));

(3) The Commission could not delegate its authority under section 709(b) to make agreements with States under which the Commission agrees to refrain from processing certain charges or to relieve certain persons from the recordkeeping requirements; and

(4) The Commission could not provide for the conduct of administrative hearings except by members of the Commission or by hearing officers appointed in accord with 5 U.S.C. 556.

SECTION 8(h)

This subsection would afford additional protection to officers, agents, and employees of the Commission in the performance of their official duties by making 18 U.S.C. 1114 applicable to them.

SECTION 9(a), (b), AND (c)

These subsections would make certain modifications in the position of the Chairman of the Commission and the members of the Commission in the executive pay scale, so as to place them in a position of parity with officials in comparable positions in agencies having substantially equivalent powers such as the National Labor Relations Board, the Federal Trade Commission and the Federal Power Commission.

SECTION 10

Section 715.—This section transfers all of the powers and duties of the Secretary of Labor under Executive Order 11246 (as amended by Executive order 11375) to the Equal Employment Opportunity Commission. Executive Order 11246 enunciates the policy of the Government of the United States "... to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. . ." (E.O. 11246 § 101 as amended). The Executive order program is presently administered within the Department of Labor by the Office of Federal Contract Compliance, a division of the Employment Standards Administration. The section contemplates the transfer of all of the OFCC program functions related to Executive Order 11246, as amended. This section does not relieve any of the Government procurement agencies of their responsibilities under the executive order.

The present section 715 relating to a special study by the Secretary of Labor is repealed by the substitution of the new provisions. That study has been completed and the section has no more effect.

SECTION 11

Section 717(a).—This subsection would make clear that personnel actions of the U.S. Government affecting employees or applicants for employment shall be made free from any discrimination based on race, color, religion, sex, or national origin. All employees subject to the executive branch and Civil Service Commission control or protection are covered by this section.

Section 717(b).—Under this subsection, the Civil Service Commission is given the authority to enforce the provisions of subsection (a) through appropriate remedies. These remedies may include back pay for applicants, as well as employees, denied promotion opportunities, reinstatement, hire, immediate promotion and any other remedy needed to fully recompense the employee for his loss, both financially and professionally. The Civil Service Commission is also given authority to issue rules and regulations necessary to carry out its responsibilities under this section. The Civil Service Commission also shall annually review national and regional equal employment opportunity plans and be responsible for review and evaluation of all agency equal employment opportunity programs. Finally, agency and executive department heads and officers of the District of Columbia shall comply with such rules and regulations, submit an annual equal employment opportunity plan and notify any employee or applicant of any final action taken on any complaint of discrimination filed by him.

Sections 717(c) and *(d).*—The provisions of sections 706(q) through (w) concerning private civil actions by aggrieved persons are made applicable to aggrieved Federal employees or applicants. They could file a civil action within 30 days of notice of final action

on a complaint made pursuant to section 717(b), or after 180 days from the filing of an initial charge, or an appeal with the Commission. The authority given to the Commission or the limitations placed upon the Commission under sections 706(q) through (w) would apply to the Civil Service Commission or the agencies, as appropriate, in connection with a civil action brought under section 717(c). So, for example, if the Civil Service Commission or agency does not issue an order within 180 days after a complaint or appeal is filed, the aggrieved person may also institute a civil action. If such action is instituted within one year of the filing of the complaint or appeal, the Civil Service Commission or agency may request that the action be stayed or dismissed upon a showing that it has been acting with due diligence, that it anticipates issuance of an order within a reasonable time on the complaint or appeal, that the case or proceeding is exceptional and that extension of exclusive jurisdiction of the Civil Service Commission or agency is warranted.

Section 717(e).—This subsection provides that nothing in this act relieves any Government agency or official of his existing nondiscrimination obligations under the Constitution, other statutes, or his or its responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SECTION 12

Section 716 is amended to provide for consultation of the Attorney General, the Chairman of the Civil Service Commission, and the Chairman of the Equal Employment Opportunity Commission regarding rules, regulations and policy in the performance of their responsibilities under this act. It does not in any way limit each of the officials in independently carrying out their respective obligations under this title.

SECTION 13

This section provides that the amended provisions of section 706 concerning the cease and desist enforcement powers would not apply to charges filed with the Commission prior to the effective date of this act. In addition, those new or amended sections of title VII not specifically stated in this section to be inapplicable to current charges, such as the amendments to sections 705, 707, 709, 710, 713, and 715 would cover existing charges.

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

CIVIL RIGHTS ACT OF 1964

AN ACT To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public educaton, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments*, *governmental agencies*, *political subdivisions*, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has [twenty-five] *eight* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or [a State or political subdivision thereof.] *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of [1954: *Provided*, That] *1954, except that* during the first year after the [effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, having fewer than seventy-five

employees (and their agents) shall not be considered employers, and, during the third year after such date] *date of enactment of the Equal Employment Opportunities Enforcement Act of 1971*, persons having fewer than [fifty] *twenty-five* employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person [; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance].

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) [one hundred] *twenty-five* or more during the first year after the [effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five] *date of enactment of the Equal Employment Opportunities Enforcement Act of 1971, or (B) eight* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees or employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through *which such employees may enjoy membership or become affiliated* with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor

organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of [1959.] *1959, and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its religious activities [or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution].

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color,

religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ an individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, *or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-*

front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in compari-

son with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs*, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization [or employment agency] *employment agency or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs*, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employee or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, *or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin, is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, *unless additional members are appointed as hereinafter provided in this subsection*, [not more than three of whom] *not more than the least number of members sufficient to constitute a majority of the members of the Commission* shall be members of the same political party, [who] *members of the Commission* shall be appointed by the President by and with the advice and consent of the [Senate] *Senate. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such members of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after*

the adjournment sine die of the session of the Senate in which such nomination was submitted. [One of the original members shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years, beginning from the date of enactment of this title, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed.] The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and shall appoint, in accordance with the [civil service laws, such officers, agents, attorneys,] *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners,* and employees as [it] *he* deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the [Classification Act of 1949, as amended. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office] *provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code. At any time after one year from the effective date of this Act, the Chairman of the Commission, if he determines that the appointment of additional members of the Commission would help to effectuate the purposes of this Act, may request the President to appoint up to four additional members of the Commission. Upon receiving such a request, the President may appoint up to four additional members of the Commission by and with the advice and consent of the Senate. Such additional members shall be appointed for a term of five years. Upon the expiration of the term of appointment of any such additional member no further appointment to the same position shall be made, and the total number of members of the Commission shall be reduced accordingly unless the Chairman of the Commission determines that the appointment of one or more additional members of the Commission continues to be necessary to better effectuate the purposes of this Act and so advises the President.*

(b) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(c) The Commission shall have an official seal which shall be judicially noticed.

(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(e) [The Federal Executive Pay Act of 1956, as amended (5 U.S.C. 2201–2209), is further amended—

[(1) by adding to section 105 thereof (5 U.S.C. 2204) the following clause:

[“(32) Chairman, Equal Employment Opportunity Commission”: and

[(2) by adding to clause (45) of section 106(a) thereof (5 U.S.C. 2205(a)) the following: “Equal Employment Opportunity Commission (4).”]

(1) Section 5314 of title 5 of the United States Code is amended by adding at the end thereof the following new clause.

“(58) Chairman, Equal Employment Opportunity Commission.”

(2) Clause (72) of section 5315 of such title is amended to read as follows.

“(72) Members, Equal Employment Opportunity Commission (8).”

(3) Clause (111) of section 5316 of such title is repealed.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and [individuals;] *individuals, and to accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)).*

(2) to pay witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

[(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.]

(6) *to intervene in a civil action brought by an aggrieved party under section 706.*

(h) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court.

(i) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(j) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. [(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.]

SEC. 706. *(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

[(a)] *(b)* Whenever [it is charged in writing under oath by a] *a charge is filed by or on behalf of a* person claiming to be aggrieved, or [a written charge has been filed] by [a member] *an officer or employee* of the Commission [where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based)] *upon the request of any person claiming to be aggrieved, alleging* that an employer, employment agency, [or] labor [organization] *organization, or joint labor-management, committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an unlawful employment practice, the Commission shall [furnish] *serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on* such employer, employment agency, [or] labor [organization] *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") [with a copy of such charge and shall make an investigation of such charge, provided that such charge] *within ten days and shall make an investigation thereof. Charges shall be in writing and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission [shall determine,] *determines* after such investigation [,] that there is *not* reasonable cause to believe that the charge is true,

it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the [Commission] *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the [parties, or used as evidence in a subsequent proceeding] *persons concerned.* Any [officer or employee of the Commission,] *person* who [shall make] *makes* public [in any manner whatever any] information in violation of this subsection [shall be deemed guilty of a misdemeanor and upon conviction thereof] shall be fined not more than $1,000 or imprisoned *for* not more than one [year.] *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.*

[(b)] (*c*) In the case of [an alleged] *a charge filed by or on behalf of a person claiming to be aggrieved alleging an* unlawful employment practice occurring in a [State,] *State* or political subdivision of a [State,] *State* which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice [thereof, no charge may be filed under subsection (a) by the person aggrieved] *thereof the Commission shall take no action with respect to the investigation of such charge* before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier [terminated, provided that] *terminated, except that* such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered *or certified* mail to the appropriate State or local authority.

[(c)] (*d*) In the case of any charged filed by [a member] *an officer or employee* of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State[,] which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof[,] the

Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective [day] *date* of such State or local [law),] *law*), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

[(d)] (*e*) A charge under [subsection (a)] *this section* shall be filed within [ninety] *one hundred and eighty* days after the alleged unlawful employment practice [occurred,] *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter*, except that in [the] *a* case of an unlawful employment practice with respect to which the person aggrieved has [followed the procedure set out in subsection (b),] *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof*, such charge shall be filed by *or on behalf of* the person aggrieved within [two hundred and ten] *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

[(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.]

(*f*) *If the Commission determines after attempting to secure voluntary compliance under subsection (b) that it is unable to secure from the respondent a conciliation agreement acceptable to the Commission which determination shall not be reviewable in any court, the Commission shall issue and cause to be served upon any respondent not a*

government, governmental agency, or political subdivision a complaint stating the facts upon which the allegation of the unlawful employment practice is based, together with a notice of hearing before the Commission, or a member or agent thereof, at a place therein fixed not less than five days after the serving of such complaint. In the case of a respondent which is a government, governmental agency, or political subdivision, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in such civil action. The provisions of section 706(q) through (w), as applicable, shall govern civil actions brought hereunder. Related proceedings may be consolidated for hearing. Any officer or employee of the Commission who filed a charge in any case shall not participate in a hearing on any complaint arising out of such charge, except as a witness.

(g) A respondent shall have the right to file an answer to the complaint against him and with the leave of the Commission, which shall be granted whenever it is reasonable and fair to do so, may amend his answer at any time. Respondents and the person or persons aggrieved shall be parties and may appear at any stage of the proceedings, with or without counsel. The Commission may grant other persons a right to intervene or to file briefs or make oral arguments as amicus curiae or for other purposes, as it considers appropriate. All testimony shall be taken under oath and shall be reduced to writing. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure for the district courts of the United States.

(h) If the Commission finds that the respondent has engaged in an unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons aggrieved by such unlawful practice an order requiring the respondent to cease and desist from such unlawful employment practice and to take such affirmative action, including reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organizations, as the case may be, responsible for the unlawful employment practice), as will effectuate the policies of this title, except that (1) back pay liability shall not exceed that which has accrued more than two years prior to the filing of a charge with the Commission, and (2) interim earnings or amounts earnable with reasonable diligence by the aggrieved person or persons shall operate to reduce the back pay otherwise allowable. Such order may further require such respondent to make reports from time to time showing the extent to which he has complied with the order. If the Commission finds that the respondent has not engaged in any unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons alleged in the complaint to be aggrieved an order dismissing the complaint.

(i) After a charge has been filed and until the record has been filed in court as hereinafter provided, the proceeding may at any time be ended by agreement between the commission and the respondent for the elim-

ination of the alleged unlawful employment practice and the Commission may at any time, upon reasonable notice, modify or set aside, in whole or in part, any finding or order made or issued by it. An agreement approved by the Commission shall be enforceable under subsections (l) through (n) and the provisions of those subsections shall be applicable to the extent appropriate to a proceeding to enforce an agreement.

(j) Findings of fact and orders made or issued under subsections (h) or (i) of this section shall be determined on the record. Sections 554, 555, 556, and 557 of title 5 of the United States Code shall apply to such proceedings.

(k) Any party aggrieved by a final order of the Commission granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals for the circuit in which the unlawful employment practice in question is alleged to have occurred or in which such party resides or transacts business, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days after the service of such order, a written petition praying that the order of the Commission be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to any other party to the proceeding before the Commission, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon the filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant to the petitioner or any other party, including the Commission, such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. Any party to the proceeding before the Commission shall be permitted to intervene in the court of appeals. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission, its member, or agent shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, its member, or its agent, the court may order such additional evidence to be taken before the Commission, its member, or its agent, and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order.

Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code. Petitions filed under this subsection shall be heard expeditiously.

(l) The Commission may petition any United States court of appeals for the circuit in which the unlawful employment practice in question occurred or in which the respondent resides or transacts business, for the enforcement of its order and for appropriate temporary relief or restraining order, by filing in such court a written petition praying that its order be enforced and for appropriate temporary relief or restraining order. The Commission shall file in court with its petition the record in the proceeding as provided in section 2112 of title 28, United States Code. A copy of such petition shall be forthwith transmitted by the clerk of the court to the parties to the proceeding before the Commission. Upon the filing of such petition, the court shall have jurisdiction of the proceeding and of the question determined therein and shall have power to grant to the Commission, or any other party, such temporary relief, restraining order, or other order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. Any party to the proceeding before the Commission shall be permitted to intervene in the court of appeals. No objection that has not been urged before the Commission, its members, or agent shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, its member, or its agent, the court may order such additional evidence to be taken before the Commission, its member, or its agent, and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States as provided in section 1254 of title 28, United States Code. Petitions filed under this subsection shall be heard expenditiously.

(m) If no petition for review, as provided in subsection (k), is filed within sixty days after service of the Commission's order the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Commission under subsection (l) after the expiration of such sixty-day period. The clerk

of the court of appeals in which such petition for enforcement is filed shall forthwith enter a decree enforcing the order of the Commission and shall transmit a copy of such decree to the Commission, the respondent named in the petition, and to any other parties to the proceeding before the Commission.

(n) If within ninety days after service of the Commission's order, no petition for review has been filed as provided in subsection (k), and the Commission has not sought enforcement of its order as provided in subsection (l), any person entitled to relief under the Commission's order may petition for a decree enforcing the order in the United States court of appeals for the circuit in which the unlawful employment practice in question occurred, or in which a respondent named in the order resides or transacts business. The provisions of subsection (m) shall apply to such petitions for enforcement.

(o) The Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court of the United States pursuant to this title. All other litigation affecting the Commission, or to which it is a party, shall be conducted by attorneys appointed by the Commission.

(p) Whenever a charge is filed with the Commission pursuant to subsection (b) and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to preserve the power of the Commission to grant effective relief in the proceeding, the Commission shall, after it issues a complaint, bring an action for appropriate temporary or preliminary relief pending its final disposition of such charge, or until the filing of a petition under subsections (k), (l), (m), or (n) of this section, as the case may be, in the United States district court for any judicial district in the State in which the unlawful employment practice concerned is alleged to have been committed, or the judicial district in which the aggrieved person would have been employed but for the alleged unlawful employment practice, but, if the respondent is not found within any such judicial district, such an action may be brought in the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a judicial district in which such an action might have been brought. Upon the bringing of any such action, the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. Rule 65 of the Federal Rules of Civil Procedure, except paragraph (a) (2) thereof, shall govern proceedings under his subsection.

(q) (1) If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not issued a complaint under subsection (f), the Attorney General has not filed a civil action under subsection (f) or the Commission entered into an agreement under subsection (f) or (i) to which the person aggrieved is a party, the Commission shall so notify the person aggrieved and within sixty days after the giving of such notice a civil action may be brought against the respondent named

in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by an officer or employee of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the Complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon the commencement of such civil action, the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, shall take no further action with respect thereto, except that, upon timely application, the court in its discretion may permit the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, to intervene in such civil action if the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending termination of State or local proceedings described in subsection (c) or (d) or the efforts of the Commission to obtain voluntary compliance.

(2) The right of an aggrieved person to bring a civil action under paragraph (1) of this subsection shall terminate once the Commission has issued a complaint under subsection (f) or the Attorney General has filed a civil action under subsection (f) or the Commission has entered into an agreement under subsection (f) or (i) to which the person aggrieved is a party, except that (1) if after issuing a complaint the Commission enters into an agreement under subsection (i) without the agreement of the person aggrieved or has not issued an order under subsection (h) within a period of one hundred and eighty days of the issuance of the complaint, the Commission shall so notify the person aggrieved and a civil action may be brought against the respondent named in the charge at any time prior to the Commission's issuance of an order under subsection (h) or, in the case of an agreement under subsection (i) to which the person aggrieved is not a party, within sixty days after receiving notice thereof from the Commission, and (2) that where there has been no agreement under subsection (i), if the person aggrieved files a civil action against the respondent during the period from one hundred and eighty days to one year after the issuance of the complaint such person shall notify the Commission of such action and the Commission may petition the court not to proceed with the suit. The court may dismiss or stay any such action upon a showing that the Commission has been acting with due diligence on the complaint, that the Commission anticipates the issuance of an order under subsection (h) within a reasonable period of time, that the case is exceptional, and that extension of the Commission's jurisdiction is warranted.

[(f)](r) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such

practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought. *Upon the bringing of any such action, the district court shall have jurisdiction to grant such temporary or preliminary relief as it deems just and proper.*

[(g)] *(s)* If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order or the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

[(h)] *(t)* The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

[(i)] *(u)* In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection [(e),] *(q)*, the Commission may commence proceedings to compel compliance with such order.

[(j)] *(v)* Any civil action brought under subsection [(e)] *(q)* and any proceedings brought under subsection [(i)] *(u)* shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

[(k)] *(w)* In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described,

the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or pactice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunities Enforcement Act of 1971, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits and neither House of Congress vetoes a reorganization plan submitted pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with the provisions of subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America. The Attorney General or Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunities Enforcement Act of 1971, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by an officer or employee of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706, including the provisions for enforcement and appellate review contained in subsections (k), (l), (m), and (n) thereof.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and* utilize the services of such agencies and their employees and, notwithstanding any other provision of law, [may] *pay by advance or* [reimburse] *reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreement [and under which no person may bring a civil action under section 706 in any cases or class of cases so specified, or under which the Commission shall relieve any person or class of] *or under which the Commission shall relieve any person or class of* persons in such State or locality from requirements imposed under this section. The Commission shall rescind any

such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) [Except as provided in subsection (d), every] *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which [such] applications were received, and [shall] *to* furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may [(1)] apply to the Commission for an exemption from the application of such regulation or order, [or (2)] *and, if such application for an exemption is denied,* bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.*

[(d) The provisions of subsection (c) shall not appy to any employer, employment agency, labor organization, or joint labor-management committee with respect to matters occurring in any State or political subdivision thereof which has a fair employment practice law during any period in which such employer, employment agency, labor organization, or joint labor-management committee is subject to such law, except that the Commission may require such notations on records which such employer, employment agency, labor organization, or joint labor-management committee keeps or is required to keep as are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this title. Where an employer is required by Executive Order 10925, issued March 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and

he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.]

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Any record or paper required by section 709(c) of this title to be preserved or maintained shall be made available for inspection, reproduction, and copying by the Commission or its representative, or by the Attorney General or his representative, upon demand in writing directed to the person having custody, possession, or control of such record or paper. Unless otherwise ordered by a court of the United States, neither the members of the Commission or its representative, nor the Attorney General, or his representative shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress or any committee thereof, or to a governmental agency, or in the presentation of any case or proceeding before any court or grand jury. The United States district court for the district in which a demand is made or in which a record or paper so demanded is located, shall have jurisdiction to compel by appropriate process the production of such record or paper.

[(c)] *(f)* It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

[SEC. 710. (a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

[(b) If the respondent named in a charge filed under section 706 fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 709(a), or if any person required to comply with

the provisions of section 709 (c) or (d) fails or refuses to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the provisions of section 709 (c) or (d) or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

[(c) Within twenty days after the service upon any person charged under section 706 of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 709(a), such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court, Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this title or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

[(d) In any proceeding brought by the Commission under subsection (b), except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.]

SEC. *710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply. No subpoena shall be issued on the application of any party to proceedings before the Commission until after the Commission has issued and caused to be served upon the respondent a complaint and notice of hearing under subsection (f) of section 706.*

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from

or, summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

(c) Except for the powers granted to the Commission under subsection (h) of section 706, the power to modify or set aside its findings, or make new findings, under subsections (i), (k), and (l) of section 706, the rulemaking power as defined in subchapter II of chapter 5 of title 5, United States Code, with reference to general rules as distinguished from rules of specific applicability, and the power to enter into or rescind agreements with State and local agencies, as provided in subsection (b) of section 709, under which the Commission agrees to refrain from processing a charge in any cases or class of cases or under which the Commission agrees to relieve any person or class of persons in such State or locality from requirements imposed by section 709, the Commission may delegate any of its functions, duties, and powers to such person or persons as the Commission may designate by regulation, including functions, duties, and powers with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter. Nothing in this subsection authorizes the Commission to provide for persons other than those referred to in

clauses (2) and (3) of subsection (b) of section 556 of title 5 of the United States Code to conduct any hearing to which that section applies.

(d) The Commission is authorized to delegate to any group of three or more members of the Commission any or all of the powers which it may itself exercise.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of section 111, *and 1114* title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties.

SPECIAL STUDY BY SECRETARY OF LABOR

[SEC. 715. The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.]

SEC. 715. All authority, functions, and responsibilities vested in the Secretary of Labor pursuant to Executive Order 11246, as amended, relating to nondiscrimination in employment by Government contractors and subcontractors and nondiscrimiation in federally assisted construction contracts are transferred to the Equal Employment Opportunity Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available or to be made available in connection with the functions transferred to the Commission hereby as may be necessary to enable the Commission to carry out its functions pursuant to this section, and the Commission shall hereafter carry out all such authority, functions, and responsibilities pursuant to such order.

EFFECTIVE DATE

SEC. 716.(a) This title shall become effective one year after the date of its enactment.

(b) Nothwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the president's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment

opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

(d) In the performance of their responsibilities under this Act, the Attorney General, the Chairman of the Civil Service Commission and the Chairman of the Equal Employment Opportunity Commission shall consult regarding their rules, regulations and policies.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Rate Commission in those unit of the Government of the District of Columbia having positions in the competitive service, and in the legislative and judicial branches of the Federal Government having positions in the competitive servce, shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) The Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in section 717 (a) shall submit in order to maintain an affimative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by his thereunder. The plan submitted by each department, agency and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) *a description of the qualifications in terms of training and experience relating to equal opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.*

(c) *Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit, on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after 180 days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706(q), in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.*

(d) *The provisions of section 706(q) through (w), as applicable, shall govern civil actions brought hereunder.*

(e) *Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.*

Sec. 13 of S. 2515 reads as follows: The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall not be applicable to charges filed with the Commission prior to the enactment of this Act.)

APPENDIX A

Administrative Procedure Act of 1946, as Codified in Title 5, United States Code, Excerpts

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts-martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744, of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency.—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding or property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief or the equivalent, or denial thereof, or failure to act.

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceedings.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribe costs, procure a copy or transcript thereof, except that in a nonpublic investigatory

proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

§ 559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5362, and 7521, and the provisions of section 5335(a)(B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5362, or 7521, or the provisions of section 5335(a)(B) of this title that relate to hearing examiners, except to the extent that it does so expressly.

APPENDIX B

NATIONAL LABOR RELATIONS ACT OF 1935, AS AMENDED, SECTION 11, 29 U.S.C. 161

Sec. 11. Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 9 and 10 of this title—

DOCUMENTARY EVIDENCE; SUMMONING WITNESSES AND TAKING TESTIMONY

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

COURT AID IN COMPELLING PRODUCTION OF EVIDENCE AND ATTENDANCE OF WITNESSES

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

PRIVILEGE OF WITNESSES; IMMUNITY FROM PROSECUTION

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

PROCESS, SERVICE AND RETURN; FEES OF WITNESSES

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

PROCESS, WHERE SERVED

(5) All process of any court to which application may be made under this subchapter may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

INFORMATION AND ASSISTANCE FROM DEPARTMENTS

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board. July 5, 1935, c. 372, § 11, 49 Stat. 455; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 150.

APPENDIX C

FEDERAL RULES OF CIVIL PROCEDURE

Rule 65. Injunctions

(a) PRELIMINARY INJUNCTION.

(1) *Notice.*—No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.*—Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION.—A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and

in that event the court shall proceed to hear and determine such motion as expeditously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule. As amended Feb. 28, 1966, effective July 1, 1966.

INDIVIDUAL VIEWS OF MR. DOMINICK

Since enactment as part of the Civil Rights Act of 1964, Title VII has stood as a national commitment to the elimination of all forms of employment discrimination. Unfortunately, such a commitment has remained only a statement which, because of the lack of enforcement machinery, has not been translated into concrete realities for those in the nation's workforce who have been denied employment benefits because of their race, color, religion, sex or national origin. The issue is no longer whether we need enforcement powers for Title VII, but rather what form and scope of enforcement is needed to best protect the rights of all parties involved. To accomplish this end the Senate is given two types of enforcement machinery to choose from—vesting EEOC with cease and desist powers or giving EEOC the authority to sue directly in Federal Courts.

Elemental Arguments Misleading

It is overly simplistic to argue as many have, that protection of employees rights can best be achieved by vesting the present pro-employee Commission with as much enforcement power as possible. The vicissitudes of Presidentially appointed Boards is legend. The administrative Board possessing enforcement powers most similar to the cease and desist powers advocated by the majority, the National Labor Relations Board, provides the best example of this. Critics charge that the NLRB, in reacting to political winds rather than stare decisis, have fluctuated from pro-management decisions during the Eisenhower Administration to pro-labor positions during the Johnson and Kennedy Administration. Determination of employment civil rights deserves and requires non-partisan judgment. This judgment is best afforded by Federal court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection and supported by historical judicial independence.

Likewise simplistic reasoning has classified proponents of court enforcement as being pro-respondent or anti-employees' rights. Nothing could be less correct. Both procedures seek to achieve the same end—the fair redress of employees' grievances. Although I opposed the cease and desist provisions, I voted to report S. 2515, as amended, out of committee favorably as I was most encouraged by the potential relief its compromise amendments offered federal employees. As the report indicates, these employees are the most frustrated in achieving equal employment opportunity. I authored an amendment with Senator Cranston which was adopted that provided the approximately 2.6 million civil service and postal workers with court redress of their employment discrimination grievances. The amendment creates machinery suggested by Clarence Mitchell, Director, Washington Bureau,

NAACP, whereby an aggrieved civil service or postal employee has the option after exhausting his agency remedies, of either instituting a civil suit in Federal district court or continuing through the Civil Service Board of Appeals and Reviews to district court, if necessary.

Curiously enough, the majority seems pleased with court enforcement procedures for 2.6 million federal employees, but continues to urge cease and desist procedures for private employees.

Objective Consideration of the Merits is Necessary

Once the simplistic classifications and emotional rhetoric has been cleared away, one can objectively examine the potentials of the contending procedures. To determine whether court enforcement or cease and desist machinery best protects the rights of all parties involved in the proceedings the following issues should be carefully considered.

S. 2515 Impairs the Respondent's Due Process Rights

Whereas the court approach preserves the traditional separation of powers which we as a nation so highly cherish, the cease and desist procedure seriously threatens the respondent's due process rights by joining the prosecutorial function with the adjudicatory function. Under a cease and desist proceeding the EEOC would investigate the charge, issue the complaint, prosecute the complaint, adjudicate the merits of the case, and seek enforcement of its decisions in the United States Circuit Courts of Appeals. Elemental concepts of fairness and due process require an impartiality in the adjudicatory function which could not be attained under S. 2515.

What is necessary is aggressive and active advocacy of equal employment opportunity at the investigatory and prosecutory level. Court enforcement would utilize this advocacy up through conciliation. If conciliation proves unsuccessful the EEOC would petition the Federal District Courts for redress of the employees' grievances. Thus, the final adjudication would be an impartial judicial decision free from accusation of institutional bias.

Court Enforcement Utilizes the Assets of Both the EEOC and the Judiciary

The court approach combines the expertise of the EEOC in investigating, prosecessing, and conciliating unfair employment cases with the expertise and independence of the Federal courts. The Federal courts have developed considerable expertise and a reputation of fairness in enforcing equal opportunity laws in all other areas of civil rights, including public accommodations, voting, education, and housing. They have developed specific expertise through vigorous protection of Title VII rights. In fiscal 1970 alone, the EEOC filed amicus briefs in 167 of the more important Title VII enforcement cases in the federal courts. The EEOC recognized the important role the courts have played when it concluded in its most recent (5th) Annual Report that:

> The Commission feels that the course of litigation over the past year (fiscal year 1970) has been encouraged and that the

law has developed in a liberal fashion appropriate to a humanitarian and remedial statute. The implementation of Title VII gives hope for the future of all Americans.

COURT ENFORCEMENT PROVIDES AN EXPEDITIOUS AND FINAL REMEDY

Effective protection of the rights of both the employer and the employee demands a speedy resolution of the dispute. Facts indicate that the court enforcement procedure is more expeditious as it involves a one step enforcement procedure whereas the cease and desist order requires two steps. A district court order is immediately self-enforcing as it is backed by court contempt proceedings. A commission cease and desist order must be brought to the Court of Appeals before it achieves similar sanction power. Additionally, there is a definite advantage in having the judge who enters the original order be the person who will hear any subsequent enforcement proceedings. A judge who is enforcing his own orders rather than those of some commission will be determined that such orders are properly enforced.

To a large extent, speedy resolution of an unfair employment practice will be determined by the respective caseloads of the EEOC and the district courts. Chairman Brown of the EEOC testified that as of June 30, 1971, the Commission had a backlog of 32,000 cases with an anticipated fiscal year 1971 caseload of 32,000 additional cases. Also S. 2515 would expand coverage from the present employers with 25 or more employees to those with 8 or more employees, thereby adding approximately 6.5 million potential aggrieved. Additionally, the EEOC will be responsible for conciliating disputes of an additional 10.1 million State and local government employees pursuant to the adopted Eagleton-Taft amendment. While the present EEOC complaint disposition requires from 18 to 24 months, the median time interval from issue to trial for non jury trials in U.S. district courts in 1970 was ten months according to the Annual Report of the Director of the Administrative Office of the U.S. Courts. Congressman Erlenborn testified before the Labor Subcommittee that of the 29 District Courts which would receive the brunt of the unfair employment practice cases from the top ten states in terms of EEOC recommended investigation, 21 courts had a medium time of 12 months or less for non jury trials and 8 courts had a medium time of 6 months or less for a non jury trial.

In addition, a further impediment to timely action under the administrative approach is that only the Commission in Washington and not any of the field attorneys could issue cease and desist orders. The judicial approach offers potential remedies through 398 judges on the bench in 93 existing federal district courts.

Hopefully, the above discussion will serve to better clarify an issue which in the recent past has been the subject of much rhetoric and little objectivity.

TRANSFER OF "PATTERN AND PRACTICE" UNJUSTIFIED

In addition to the previously discussed major issue, I am concerned by the provision of S. 2515 which transfers "pattern and practice" suits from the jurisdiction of the Justice Department to the EEOC.

The majority has presented no compelling reason for the transfer other than for unification sake—a suspect phobia if not supported by additional factors. Both the Justice Department and Chairman Brown are satisfied with the present administration of "pattern and practice" suits. Vesting EEOC with cease and desist powers over what has been a successful litigation process simply compounds the confusion.

PETER B. DOMINICK.

SUPPLEMENTAL VIEWS OF MR. TAFT

In general I support S. 2515 and believe it can do much to improve progress on opening job opportunities. I do intend to introduce an amendment on the Senate floor to provide autonomy for the Office of General Counsel from the Equal Employment Opportunity Commission. I believe this approach will insure procedural fairness in the administrative operation of the Commission and eliminate some serious objections to broadened Commission authority. This amendment was discussed in Committee favorably, but was not pressed at the time because of a desire to perfect it in form.

ROBERT TAFT, JR.

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